a proposal for consumer misleading and unfair trade practices legislation for Canada

second stage revision
combines investigation act 1976

prepared for the Department of Consumer and Corporate Affairs
The Honourable André Ouellet, Minister

THE POLITICAL AND CONSTITUTIONAL BASIS FOR A NEW TRADE PRACTICES ACT

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Catalogue No. RG52-9/1976 Price : Canada : $2.75
Other countries : $3.30

Price subject to change without notice

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FOREWORD

This paper forms a part of the studies which various individuals have undertaken on behalf of the Bureau of Competition Policy in connection with the development of the second stage of Canada's competition policy, the amending process of which began with the preparation of the Interim Report on Competition Policy of the Economic Council.*

Others have undertaken the examination of the directions of advertising legislation in the criminal, administrative and private law spheres in an attempt to provide some rationalization to the present and developing law in the area.** Their mandate was limited to the structuring of "a model regulatory framework for the regulation of misleading advertising and residual unfair trade practices in the consumer market-place".*** Our terms of reference are complementary. We are requested to examine the political and constitutional considerations which would come into play if their

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* Ottawa, 1969. The so-called "Interim" Report was, of course, the only and therefore "final" report.

** The reference is to Prof. M.J. Trebilcock and his associates, Messrs. A. Duggan, H. Wilton-Siegel and C. Masse, and Ms L. Robinson, whose study is entitled Proposed Policy Directions for the Reform of the Regulation of Unfair Trade Practices in Canada (Canada, Department of Consumer and Corporate Affairs, Bureau of Competition Policy, 1976). We assume some familiarity with that report on the part of the reader.

*** Ibid., at p. 1.

rationalized framework were implemented and to suggest, to the extent that it is realistic to do so, possible models for the sharing of the trade practices jurisdiction in Canada.

This mandate presents manifold difficulties, some of which are discussed in this Foreword but we must draw immediate attention to one of the most formidable. Simply put, we know neither the form nor the content of the final version of the ideal, rationalized, now hypothetical federal trade practices law. In a field where both choice and disposition of words are juridically crucial, one can appreciate the dimensions of the problem posed. Fortunately the Trebilcock study at least proposes the framework, if not the framing, of the substantive and procedural tools and, based upon this broad backdrop and upon certain assumptions which we shall make in the body of this paper, we shall draw our tentative (and sometimes hesitant) conclusions.

It almost goes without saying that the job of assessing the political climate is replete with pitfalls. Had interviews been primarily designed to be conducted at the ministerial level, we would have had to contend with the political and personal agendas (neither of which would probably have been revealed) of individuals either new to the role or, in all cases, temporarily occupying the consumer ministry. The result was, of course, that the interviews were held at the level of the senior officials, the Deputy Ministers (who, in many cases, undoubtedly had their own hidden agendas, although one may be entitled to assume that these were almost certain not to be of an electoral

nature)*. Even in those circumstances, one expects that the Deputy reflects to some degree the political flavour, broadly speaking, of his Minister. This, of course, implies that answers given in the interviews may have a temporary life. (Two elections were held during the course of this study alone.)

The interviews with the Deputy Ministers were fruitful by and large, and we appreciate the time they and their staffs made available to us. They know their field and each other (equally important) and we were certainly able to uncover sentiments and opinions regarding the present and possible future course of provincial and federal trade practice activity. All of the provinces were apprised of the existence of our mandate and of the broad goals of the study and we obtained the input of the responsible officials in every province except Prince Edward Island (due to unfortunate time difficulties).

We also visited officials in the federal regional offices. They spoke freely and were consequently of considerable help in uncovering shortcomings in the present legislation. (It should be borne in mind that Bill C-2 was not in force, nor had it had Third Reading, at the time of the bulk of the interviews.) It is unlikely that anything contained in it will substantially meet the requests of the field officials. If anything, their view was that the new variable, the federal government freeze, was likely to make their lives

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* Although the Ministers in three of the provinces were kind enough to make themselves available, one of these remained for the entire interview and provided extremely valuable reactions and assistance.

more difficult,* particularly in view of the need to administer some new provisions which, they anticipated, would be in force in the near future.

We also visited the President's Office of Consumer Affairs and the Federal Trade Commission in Washington D.C., attempting thereby to obtain at least limited information regarding the functioning of trade practice laws in the neighbouring federal structure. Ted Garrish, Betty Bay and Al Finkel at OCA and Gale Gotschall at PTC extended their customary warm reception and extensive co-operation to us. We much appreciate their help but wish to make it clear that any comments made regarding the American position or conclusions drawn in connection therewith are our responsibility, not theirs.

The constitutional legal analysis will be briefer than might have been anticipated. It was felt that a study of this nature need not begin at the level of explanation of the meaning of a federal jurisdiction or of familiar terms, such as "pith and substance", "concurrency", "paramountcy", and so on, except to the extent that these may be in the process of being reshaped by the courts in such a way as to have meaning for the trade practices field. Nor did we assume that it was necessary to review in depth the constitutional case law recently reviewed by Warren Grover and Peter Hogg** and so often rehashed by the courts in the succession of combines challenges, not to mention the other rubrics of jurisdictional clashing.

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* By not permitting the hiring of new personnel, most investigators visited already felt short-staffed vis-à-vis the administration of the present Act.

** An abridged version of their study appears in (1976) 1 Can. Bus. L.J., forthcoming.

Detailed discussion of the alternative models of jurisdiction-sharing takes place in Chapter III but it would be fair to observe here (perhaps for the purpose of conditioning the reader for what follows) that the implementation of the structure or framework for trade practice regulation is a governmental and political proposition unberrimae fidei for both federal and provincial members of the respective legislatures. Extreme good intention and self-effacing concern, with consumers as the beneficiary of both, may be necessary for the attainment of the goal.

It is appropriate to designate primary responsibility for the chapters in the study. Mr. Cohen was responsible for Chapters I through III. Prof. Ziegel prepared Chapter IV. Each of the authors reviewed and commented extensively on the draft of the other and the text and conclusions (Chapter V) reflect their common labours and consensus.

We feel it fair to observe, in closing these prefatory remarks, that the extreme shortness of time available for the preparation of this study has not permitted the full exploration of the issues canvassed nor the full deployment of scholarity techniques to which some of our readers may be accustomed. We regret in particular our inability to explore, on a comparative basis, the constitutional implications of the Australian Trade Practices Act 1974,* many of whose provisions are paralleled in the Canadian legislation (especially as a result of the recent Bill C-2 amendments).

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* See generally G.Q. Taperell et al., Trade Practices and Consumer Protection (Butterworths, Sydney, 1974), especially at pp. 5-22.

The decision of the Supreme Court of Canada in the Vapor case* was handed down after we had submitted our initial report. Happily our interpretation of the constitutional position was not significantly affected by it and, although revisions of our text and footnotes were necessary to accommodate the most up-to-date pronouncements on various issues canvassed in this study, we have not been obliged to make major revisions.

The reader should not, however, expect a detailed analysis of the Vapor decision here nor should he expect an exhaustive exposition of, or solution to, the trade practice jurisdictional issues there. Some of the important questions in the criminal law and trade and commerce areas will only be answered in subsequent legislation.

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* MacDonald, Lailquip Enterprises Ltd. v. Vapor Canada Ltd. (January 30, 1976), unreported; rev'g (1972) F.C. 1156, 33 D.L.R. (3d) 434. All references to the Supreme Court decision infra are to the pages of the Notes of the Chief Justice as supplied by the clerk.

I INTRODUCTION

Until relatively recently, the consumer was considered a capable participant in the marketplace. In the one-on-one confrontation with manufacturers, advertisers and vendors, he was presumed to have the ability and even the duty to protect himself.

It was no doubt due in part to this philosophical attitude of the marketplace and the legislators that any outside observer of North American legislative activity in the consumer protection area might reasonably have assumed that consumer protection had been invented in the last decade.

It is true that concern with honesty and safety in the marketplace has existed during almost all of this century but the manifestation of this concern has been sparse. Periodic distress such as that of Upton Sinclair in 1906* has led to concrete response such as, in that case, the Pure Food and Drugs Act in the United States.

Unhappiness with advertising practices in the same period led to the adoption of the Printer's Ink model statute which was drafted in 1911 for the well-known trade magazine of that name.** A parallel concern with fraudulent land sales in the

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* The reference, of course, is to his exposition of conditions in the Chicago stockyards and slaughterhouses published as The Jungle.

** It was subsequently adopted by all but two of the American states. See Cohen, "Comparative False Advertising Legislation: A Beginning" (1971) Adelaide L. Rev. 69, at p. 71, 6 C.P.R. (2d) 88, at p. 91.

Canadian West resulted in the adoption of misleading advertising sanctions by the addition of article 406A to the Canadian Criminal Code in 1914.*

These examples of legislative activity are, however, piecemeal in nature and the first signs of concern with unfair or deceptive trade practices, if not with the well-being of the consumer, on a grander scale was expressed by the Americans through their creation of the Federal Trade Commission in 1914.** In fact, one might be said to be stretching the intention of the Congress in purporting to find expression of that body's concern with consumer protection in the original statutory terms. Section 5 of the Act, which has since become a kind of charter of consumer protection, then only declared unlawful "unfair methods of competition in Commerce". Notwithstanding the absence of a reference to deceptive trade practices, the agency wasted little time in concerning itself with the regulation of false advertising, this despite the fact that its jurisdiction over the subject was clearly "not the product of an explicit grant of power".***

Following certain setbacks to the Commission's regulatory efforts**** and, in an undoubted attempt to clarify the FTC's purpose and to strengthen its

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* 4-5 Geo. V, S.C. 1914, c. 24.

** Federal Trade Commission Act, Chap. 311, 38 Stat. 717 (1914), 15 U.S.C. 41.

*** Note: "Developments in the Law: Deceptive Advertising" (1967) 80 Harv. L. Rev. 1005, at p. 1019.

**** Particularly as the result of the decision of the Supreme Court in F.T.C. v. Raladam Co. (1931) 283 U.S. 643.

enforcing hand, the Wheeler-Lea amendments of 1938* added the words "unfair or deceptive acts or practices in commerce" to section 5, thereby cementing the agency's role in the consumer area by the provision of tools which permitted enforcement as vigorous here as in the anti-trust domain.

There was never, of course, an analogous agency in Canada and it is perhaps not surprising that the development of consumer protection legislation and its enforcement was considerably slower here. The Criminal Code section dealing with false advertising went through various amendments over time but, in its 55-year history in the Criminal Code,** there was but a single reported case.*** The paucity of criminal prosecutions bears sad testimony to the attitude of the provinces toward consumer protection over a half century.

The Combines Investigation Act

During the same period of time, however, the federal government was hardly more successful in infusing the consumer community with such legislation. It was not, in fact, until 1960 that Ottawa became involved to any degree in the area of trade practices. It did so by adding to the Combines

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* Chap. 49, 52 Stat. 111 (1938), 15 U.S.C. 41.

** Which is, of course, administered by the provinces although constitutionally there is nothing to preclude the federal government from assuming enforcement powers. See R. v. Pelletier (1975) 4 O.R. (2d) 677 and cf. B. McDonald (1969) 47 Can. Bar Rev. 161, at pp. 212 et seq.

***R. v. Thermo-Seal Insulation Ltd. (1952) 15 C.P.R. 42, 102 C.C.C. 68, 12 Fox Pat. C. 45 (Ont. Mag. Ct.).

Investigation Act* section 33C which dealt with misrepresentations as to the ordinary price of goods.**

It is worth drawing attention at this point to the Combines Investigation Act itself since it has had a rather chequered existence (due in no small measure to the juridical attitudes of the Judicial Committee of the Privy Council which have contributed substantially to the problems Ottawa faces today in considering the nature of the role it ought to assume in the trade practices field).

The earliest Canadian legislation, passed in 1889,*** created various criminal offenses which purported to be declaratory of the common law in the area of combinations formed in restraint of trade.**** In fact, these provisions remained a part of the Criminal Code until 1960 when they were transferred to the Combines Investigation Act and strengthened by the addition of certain other restrictive trade practices.*****

Enforcement was an early difficulty and Parliament responded by the creation of an appropriate administrative structure in the first Combines Investigation Act which was legislated in

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* R.S.C. 1952, c. 314.

** Added by 8-9 Eliz. II, S.C. 1960, c. 45, sec. 13.

*** 52 Vict., S.C. 1889, c. 41.

**** Substantially similar provisions continue to exist as sec. 32 of the current statute.

*****By 8-9 Eliz. II, S.C. 1960, c. 45, sec. 13.

1910.* It was repealed and replaced by the Board of Commerce Act** and the Combines and Fair Prices Act,*** which legislation was found ultra vires the Parliament on November 11, 1921.**** The federal legislators responded rapidly by the adoption of a new Combines Investigation Act in 1923***** and it, with its various transmogrifications, is the law in Canada today.

Trade Practices Laws

The 1960's brought a near-total reversal of the previous go-slow approach to consumer legislation. Of the last decade, one might in fact observe that consumer protective measures have been introduced on an almost geometrically increasing basis from year to year throughout the period. The development was, however, somewhat different north and south of the border although the provincial and state units in their respective federal systems began their introduction of legislation at approximately the same time. Progress was considerably more rapid in the United States where 48 American

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* 9-10 Edw. VII, S.C. 1910, c. 9. The history of the legislation is reviewed by Lord Atkin in Proprietary Articles Trade Association v. A.-G. Canada (1931) A.C. 310, at pp. 318-322.

** 9-10 Geo. V, S.C. 1919, c. 37.

*** 9-10 Geo. V, S.C. 1919, c. 45.

**** In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919 (1922) 1 A.C. 191.

*****13-14 Geo. V, S.C. 1923, c. 9.

states now have trade practices legislation (although only three had any dealing with misleading advertising prior to 1965).*

Although all of the Canadian provinces became active in the consumer protection field between 1964 and 1974,** most limited their legislation to the fields of credit and direct sellers (or itinerant vendors). It was not until British Columbia and Ontario entered the trade practices arena almost simultaneously in 1974*** that the provinces could be said to have manifested any significant concern with that important area of consumer protection.

The development of consumer credit and trade practices legislation and other more specialized laws at both the provincial and federal levels has no doubt flowed from a series of factors. These include an enormous growth in consumer demand and consumption (due no doubt in some measure to the expansion of consumer credit facilities), the spreading influence of television, the acceptance of the consumer's ability "to fight City Hall" as a result of the successes of consumer advocates in Canada and the United States, and the focus on areas of consumer difficulty through legislative hearings and the publication of both official and unofficial studies and reports in the consumer domain.

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* Except, of course, for the Printer's Ink statutes mentioned above. See Cohen, op. cit., at p. 94.

** In the sense that they passed laws, the degree of enforcement activity was (and remains) variable.

***The British Columbia Act was introduced into the legislature on May 8, 1974 while the Ontario law received First Reading on May 9.

The trade practice laws in particular had their own raison d'être. In adopting its law, for example, Ontario was attempting inter alia to give its officials the tools to cope with the many complaints which had previously lain outside their grasp. Rather than using the licensing technique to control each problem-causing group or business or passing an individual statute, it was clear that a flexible all-embracing law should be considered. Hence the first statutes whose very existence (as well as the reasons therefore) were bound to encourage others.

It also goes without saying that the consumer constituency, now more unified and articulate, has become a more wooable electoral group which politicians have sought to cultivate by the introduction of helpful (although generally not too radical) legislation. The political "sexiness" of consumer measures has in some instances induced a salutary kind of competition between jurisdictions which has led to the adoption of consumer measures in other provinces. The initial "foot-race" between Ontario and British Columbia has resulted in the adoption of trade practices legislation by Alberta* and it is rumoured that Manitoba, Saskatchewan, Quebec and Newfoundland are not far behind.

The federal government's involvement with unfair trade practices dates from the 1960 adoption of the misleading price advertising section referred to above. The government then integrated its ability to deal with this and other problems in the consumer field by the passage of the Department of Consumer and Corporate Affairs Act.** Since the

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* Unfair Trade Practices Act, S.A. 1975, c. 33.

** 16-17 Eliz. II, S.C. 1967-68, c. 16; now R.S.C. 1970, c. C-27.

Department was the first of its kind in North America, it appeared at least to be an indication of the Government's intention to co-ordinate such disparate efforts as were previously being made and to initiate activity in areas where there previously had been none.

This active approach by Ottawa led to the passage of other statutes which can be classified as consumer measures, including the Hazardous Products Act,* the Consumer Packaging and Labelling Act,** and the Motor Vehicle Safety Act.*** Of more importance to the trade practices area, however, was the transfer of what was then section 306 of the Criminal Code to the Combines Investigation Act.**** By this legislative stroke, the federal government assumed the administrative responsibility for the principal legislative provision dealing with false, misleading and deceptive advertising in Canada which had, as indicated above, so long lain dormant in its Criminal Code domicile.

The continued interest of the central authority in consumer protection and unfair trade practices was apparent. Following the inclusion of Section 33D***** in the Combines Investigation Act

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* R.S.C. 1970, c. H-3.

** 19-20-21 Eliz. II, S.C. 1970-71-72, c. 41; proclaimed in force on March 1, 1974.

*** R.S.C. 1970, c. 26 (1st Supp.).

**** Added by the Criminal Law Amendment Act, 1968-69, 17-18 Eliz. II, S.C. 1968-69, c. 38, sec. 116.

***** Section 37, after the 1970 Revision; in Bill C-2, scattered through the new misleading advertising provisions.

in 1969 and the report of the Economic Council in the same year, the Minister of Consumer and Corporate Affairs introduced Bill C-256 in 1971.* In addition to proposing significant steps in the other areas of anti-competition law, the Bill proposed extensions and clarification of the federal control of deceptive trade practices.

As is well known, the bill was only introduced for discussion purposes. And discussion it received, with a vengeance. After receiving hundreds of briefs, the Government reintroduced the Bill as Bill C-227,** then as C-7,*** and finally as C-2**** (although its form did not change through this succession of new references). While various changes were apparent in the other areas of the legislation (from what had existed in Bill C-256), including the expressed intention of the Government to introduce its competition policy in two stages, the consumer provisions were not diluted.*****

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* 3rd Sess., 28th Parl., 19-20 Eliz. II, 1970-71, introduced June 29, 1971.

** 1st Sess., 29th Parl., 21-22 Eliz. II, 1973 introduced Nov. 5, 1973.

*** 2nd Sess., 29th Parl., 23 Eliz. II, 1974 introduced Mar. 11, 1974.

**** 1st Sess., 30th Parl., 23 Eliz. II, 1974, introduced Oct. 2, 1974. It was, of course, passed and came into force on January 1, 1976.

*****Some discussion of these changes can be found in Cohen, "Bill C-7: Its Proposed Amendments to the Law of False Advertising" (1974) 13 C.P.R. (2d) 197, and Ziegel, "Legal and Managerial Problems in Implementing the Consumer Aspects of the Combines Amendment Bill, Bill C-7" (1975) 17 C.P.R. (2d) 182.

The result has been an "umbrella" section prohibiting all types of misleading advertising followed by a series of specific advertising offenses. These include: representations as to the performance, efficacy or length of life of a product; representations as to ordinary price; testimonials; bait-and-switch selling; selling above advertised price; and promotional contests. There are also provisions dealing with double ticketing, pyramid selling and referral selling which fall clearly into the nature of unfair (rather than deceptive or misleading) trade practices.

While the federal government was in the process of introducing, debating and passing Bill C-2, the provinces were also beginning to assume additional responsibilities in the consumer protection area. As mentioned above, British Columbia and Ontario each introduced trade practices legislation in 1974 and they were followed by Alberta in 1975.

The American influence on all three Acts is very perceptible* and so is their emphasis on civil and administrative measures of enforcement in preference to the deterrent effect of criminal penalties although these also are present.

It is important to note that all three of these Acts, although fundamentally similar, differ from one another. Without intending to describe even a substantial portion of the differences, suffice it to say that some of these are quite

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* Which is not surprising since Prof. W.A.W. Neilson, as he then was, had previously prepared a detailed analysis of the American provisions for the Ontario government. He subsequently became B.C.'s first Deputy Minister of Consumer Services and thus was in the happy position of translating the results of his scholarship into statutory form.

material for example, the Ontario Business Practices Act, 1974* and the British Columbia Trade Practices Act** both prescribe a "laundry list" of unfair or unconscionable and misleading or deceptive acts or practices. Any person participating in one of those acts or practices is guilty of an offense and subject to fine or imprisonment. (It should, incidentally, be noted that the levels of fines are substantially different in the two jurisdictions.) In Alberta's Unfair Trade Practices Act*** one finds a similar laundry list of offenses but there are no penalties attached to their commission.

Again underlining the differences in the Acts, the commission of one of the enumerated offenses in British Columbia or Ontario leads ipso facto to the nullity or unenforceability of the contract whereas an Albertan must apply to the Court for relief which may include an order for rescission of the consumer transaction.

In addition, under the British Columbia legislation, the Director of Trade Practices may either institute proceedings or assume the conduct of proceedings on behalf of the consumer (or defend proceedings brought against the consumer). He may also sue on his own behalf, on behalf of consumers generally or on behalf of a designated class of consumers. Of equal importance, perhaps, is the fact that any person (including an association of consumers or a consumer advocate) would be entitled

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* S.O. 1974, c. 131.

** S.B.C. 1974, c. 96, as amended by S.B.C. 1975, c. 80. See also A.A. Zysblat, "Commentary" 1 Can. Bus. L.J. 99 (1975).

***S.A. 1975, c. 33.

to institute class action proceedings, despite the absence of standing or interest in the traditional sense. None of the foregoing procedural provisions are to be found in the Ontario or Alberta legislation.

Without going further, it is clear that there are substantial structural differences among the three Acts now in existence and there is every likelihood that differences of one kind or another will be found in the legislation which would seem to be on the horizon in other provinces.

Although this point was not specifically made heretofore, it is quite apparent that the terms in which the various provincial trade practices acts are drawn differ significantly from those in which the federal trade practices provisions found in the Combines Investigation Act are written. This is not surprising for they have been cast from different moulds and are in principle founded upon different heads of constitutional support. The combines provisions tend to be drafted in the traditional criminal law prohibitory form.

It is certainly arguable that business would have an easier time coping with trade practice laws across the country if they were uniform. There might, in other words, be grounds for having similar standards of behaviour (and, subject to what will be said below, possibly similar sanctions for unlawful behaviour) in the legislative provisions of the 10 provinces, the two territories and the federal government. This may be unrealistic in a federal state. It may not even be necessary. It would certinly not, however, be harmful if the result could be brought about.

From the point of view of the consumer, on the other hand, there could certainly be improvements of a significant nature. As trade practices enforcement currently goes, only the presence of the federal government in the area ensures a level

of protection from coast to coast, for only three of the provinces now have such legislation. It is true that one may anticipate similar legislation in four other Canadian provinces in the near future but that still would leave three without this sort of protection. Furthermore, it is only realistic to assume (and experience suggests that this will be the case) that the degree of enforcement, even in jurisdictions possessed of trade practices laws, will vary considerably. It follows that, to achieve uniform enforcement standards and expectations both on the part of industry and consumers, the federal government may play a useful, if not an essential, role.

The one fundamental difference between the provincial legislation and that of the federal government lies in the nature of the enforcing ability. Traditionally, the Combines Investigation Act (and most other federal consumer protection statutes)* have depended upon the criminal law. They have tended not to include civil sanctions of any kind. The provincial laws, on the other hand, have de-emphasized criminal sanctions and emphasized, in the best cases, enforcement by way of administrative and civil sanctions, complete with strong remedial provisions.

There is no doubt that a full panoply of powers - public and private, criminal and civil, preventive as well as prohibitory, remedial as well as punitive - would be extremely valuable. This is, after all the point of the Trebilcock study. If the provinces had the ability, legally and otherwise, to wield a more significant clout from a

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* Including the Food and Drugs Act, R.S.C. 1970, c. F-27, the Hazardous Products Act, R.S.C. 1970, c. H-3, and the Consumer Packaging and Labelling Act, 19-20-21 Eliz. II, S.C. 1970-71-72, c. 41.

penal point of view, they would perhaps play a more significant role from the point of view of deterrence. Conversely, the federal government, which is able to play the deterrent role, has not hitherto possessed the flexibility to provide the corresponding benefits for the consumer or consumers who may even have brought the complaint to the attention of the federal government in the first place. The prosecution (even successfully) of an advertising case by the federal government does not mean that the contract of a consumer can be set aside or that he will be paid damages or some form of compensation for the losses incurred by him as a result of the deception.

This paper will attempt to grapple with these issues. It will examine the constitutional framework of this country's consumer legislation in an attempt to determine, not only the validity of possible federal amendments geared to provide additional civil sanctions or remedies but also the extent to which current or future provincial legislation may run foul of the British North America Act.* It will also examine provincial attitudes toward federal activity in the trade practices area, whether past or prospective. It will finally, and perhaps most importantly, attempt to assess some of the ways in which the federal and provincial consumer protection authorities can adapt to each other's existence and attempt to make their ways in the trade practices area.

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* 30 Victoria, c. 3. 1867. Hereinafter referred to as the BNA Act.

II VIEWS OF THE OFFICIALS

It is hardly necessary to point out that any attempt by the federal government to expand its role in the trade practices area and to develop new and more meaningful sanctions or remedies will have ramifications which extend beyond the more objective constitutional legal determinations. More than half of the provinces have now indicated their intention to develop trade practices legislation and some of these have already staked out their claim quite firmly by the adoption of statutes and the creation of the bureaucratic structure to administer them.

In other words, even a favourable assessment of the constitutional aspects of developing trade practices legislation at the federal level would not be likely to result in a complete and final resolution or appreciation of the wisdom of the adoption of such a law. It is necessary to have, and within our terms of reference to attempt to provide, some appreciation of the likely reaction of the provinces before taking the legislative steps. Even if the decision were to be made solely on the objective constitutional grounds (assuming these were favourable to the federal position), it is not unwise to have a sense of the possible provincial response and the ways, if any exist, to smooth the adoption of such measures.

With this objective in mind, one or the other or, in some cases, both of the authors visited the senior departmental officials in nine Canadian provinces.

Conversations with the Deputy Ministers responsible for the administration of consumer legislation were fruitful in the sense that they produced responses to most, although not all, of the questions put. Reasons for seeing the Deputy Ministers were given in the Foreword. In fact,

they are usually more familiar with the nuts and bolts of the administration of the consumer statutes than their Ministers and they tend to meet more often with their colleagues in other provinces than do the Ministers, who have met only intermittently over the past five years.

These remarks would hardly be complete without mentioning the awareness both of the authors and the Deputy Ministers of political considerations in any developments in the area. The Introduction to this paper mentioned the political attractiveness of legislation in the consumer area. This alone would suggest that no person holding elective office would be likely to volunteer the giving up of "acquired" territory in the consumer field without receiving something in return. Nor would one expect to be able to apply the same parameters to all ministerial assessments of the appropriate level of activity in a given province. In the first place, different provinces have different priorities. Those which could be characterized as more rural in nature would be likely to be less concerned with consumer problems than, say, with agricultural or fishing problems, as the case may be. On the other hand, provinces with dense urban populations would tend to list consumer-business relations quite high on their order of priorities.

Secondly, there is the realization that, on the political level, one is dealing with diversity by electoral definition. When the project began, there was a Liberal government at the federal level and one Liberal, two Conservative and three NDP governments at the provincial level in the provinces visited. By the time of submission of this study, one of the Conservative governments had been reduced to a minority with a strong NDP opposition and one of the NDP governments had been removed in favour of a more conservative Social Credit majority. The likelihood of these two changes affecting policy in the consumer-business area is great, particularly when one considers that the track records

of the governments in the two provinces in question mirrored fairly faithfully, we think it fair to say, the expected political persuasions of the governments then in force.

Bearing all of this in mind, we should turn our attention to the provinces and their perceptions of themselves, the Department of Consumer and Corporate Affairs and possible incursions by the federal government into the trade practices regime.

Without undertaking either an exiguous or detailed examination of the provincial budgets in the consumer area, suffice to say that a characteristic common to almost all is the rather insubstantial amounts provided to the provincial departments responsible for consumer activity. Almost every ministry dealing with consumer affairs also has additional responsibilities in the corporations, business association or financial institutions area. British Columbia is the one exception. All of its attentions and moneys are focused upon the consumer issues alone.

Many of the provinces now perceive the need to open consumer advisory offices in some of the smaller cities and towns in the outlying areas. Alberta, Quebec, Nova Scotia and British Columbia are examples. Manitoba, which has only one office in Winnipeg but is examining the possibility of extending into other areas, provides a toll-free telephone system from everywhere in the province. Generally speaking, the provinces put some emphasis on the question of decentralization (insofar as their administrations are concerned) but this on the level of the provision of consumer services rather than investigatory work connected with the pursuit of offenders under their acts.

Insofar as violations of the provincial acts are concerned, it is worth reiterating that only three provinces presently have trade practices

legislation and that there is as yet little experience on the prosecutor level. The Alberta Act, as mentioned above, does not provide that the commission of one of the unfair trade practices delineated in the act constitutes an offence carrying penal sanctions. This means that, even when the Act comes into force, it will not provide the same kind of "threat" to potential business offenders that some of the other acts will.

Of the other provinces presently possessed of trade practice laws, Ontario has not been particularly aggressive. As of the time of our interview with the Deputy Minister, there had been no prosecutions taken under the new Act although several assurances of voluntary compliance (AVC's) had been signed. Enforcement activity in Ontario, in other words, is modest despite the fact that it is Canada's largest province.

It is clear that the most aggressive provincial department is that of British Columbia. It has assumed a high profile and strong legislation. It has actively solicited complaints of all kinds and is now receiving these at rates of about 1,000 per month (according to figures supplied to the authors by the Ministry). A substantial number of AVC's has been signed and publicity has been given to these. The Department has also used the Bankruptcy Act in its dealings with business and has issued press releases warning consumers of situations to avoid or to treat with care. The Department has also been present in the Courts in its substituted capacity but, interestingly enough, has yet to take a single prosecution despite the strong penal arrows in its quiver.

Even though it does not have trade practices legislation, Manitoba has been active in pursuing offenders under its other consumer protection legislation. The province of Quebec, in a like legislative circumstance, has been similarly

active. Saskatchewan has tended to limit its role to mediation and the Atlantic provinces have been relatively tranquil as well. A Ministry of Consumer Affairs has only recently been established in Nova Scotia while consumer matters in New Brunswick are attended to by the Provincial Secretary whose enforcement duties extend to 35 pieces of legislation (including tax and motor vehicle laws). Consumer protection appears to be a low priority there.

What emerges from even this quick overview of current levels of provincial activity in the consumer protection area is a clear variation in the type and level of activity across the country. The result is that not all of Canada's consumers are being protected to the same extent and the suggestion, even in the provinces with trade practices legislation, is that the foregoing observation may be true even if all of the provinces become armed with similar legislative tools. It remains to determine whether it ought to be up to the federal government to smooth the bumps and fill the gaps.

When the Deputy Ministers were asked to express their views on the current federal activity in the consumer area, they were quick to respond. Certain patterns of reaction emerged. Perhaps the first and most common thread (in central and western Canada) was that the provinces felt that they were closer to their citizens than the federal government could be and that, accordingly, they were better equipped to deal with consumer problems. Some, but not all of these Deputy Ministers allowed that some problems are better handled nationally than locally but the definition of these was not readily forthcoming. One Deputy Minister did suggest that questions pertaining to goods and product standards might best be left to the federal authorities who have the testing ability and the clear authority to deal with important issues such as importation but that services and contracts (and related matters) be left to the provinces.

Secondly, and this is perhaps an important reason for their suggestion that the provinces can handle matters better than the federal authorities, the officials expressed the view that the Combines Investigation Act was not a good tool to use at the local level. The reasoning for this no doubt involved the fact that the act is penal in nature and therefore has little meaning to the individual consumer who does not receive compensation, reimbursement or restitution of any kind as the result of a prosecution. In fact, he is probably better off if the case is not prosecuted as a misleading advertising offense by the federal authorities since the consumer services personnel in the regional offices of the federal Department can take the matter on and mediate provided an investigation for purposes of prosecution is not going on, for, in such cases, mediation attempts could interfere with the successful development of the case.

The perception of the Atlantic bureaucrats was considerably different. If anything, they were of the view that the federal government should increase its presence in the area. Newfoundland and New Brunswick seemed content to leave the prosecution of deceptive practices entirely to Ottawa while Nova Scotia wanted to work on a co-operative basis, with Ottawa playing the larger role.

It is no doubt worth adding to the perceptions of the provincial authorities at this point that the federal authorities interviewed around the country presented this as one of their first criticisms of their present arsenal of consumer protection weapons. They tended to feel that the provincial governments were more "relevant" because they could provide the final benefit which the consumer originally sought in registering his complaint, namely, a resolution of his own problem, without necessary regard for the final decision of the matter on the public or criminal level.

The second aspect of this second concern relates to the speed with which cases can be resolved. The theory generally expressed was that the provinces had the ability to move extremely quickly when necessary to resolve a consumer complaint, whether by rapid intervention in the Courts or the immediate issuance of bulletins or press releases alerting consumers to the existence of a problem.

The federal field people generally stated that, for various reasons, including the present centralization of authority in Ottawa (which is of course moving toward some decentralization) and the need for clearance, not to mention the questions of criminality and confidentiality, they felt that they were unable to respond quickly. Furthermore, they felt particularly sensitive about this provincial situation where, even if the stamp of authority is necessary, it can be obtained immediately.

The view of the federal field representatives is only partly accurate. Even before decentralization, all regional offices had authority to undertake investigation in urgent matters without seeking prior approval from Ottawa. (There was, of course, an obligation to notify Ottawa concurrently.) There was, on the other hand, and remains, a need for the Director's consent before a prosecution may be undertaken. The delay in obtaining this is generally insignificant when compared with the time required for the case to come up on the roll, be heard and be decided.

It should also be pointed out here that the federal authorities can move as quickly as the provinces in some circumstances. Recently, a flurry of deceptive practices in the sale of ovenware in four provinces was ended with the accused being convicted within 48-72 hours of the complaint. This speed is not, however, the hallmark of departmental

prosecutions, which do not regularly require the arrest and detention of the accused in a short time frame.

The third common provincial perception was expressed in various ways. One Deputy Minister stated, "From where I sit, the federal government wants to do everything." Others expressed the view that the "feds" feel that they are superior and that they can do the job better than the provinces. Incidentally, the members of the President's Office of Consumer Affairs in Washington indicated that the various state authorities perceive this same sense of self-accorded superiority on the part of Washington.

Fourthly, while all of the provinces visited admitted that some relations existed between their consumer department and DCCA, generally on an informal rather than a formal basis, there had been some bad experiences in dealing with the federal government. At least two provinces had had dissatisfaction with individual cases which had been referred to the local federal authorities and one province indicated that, on the current "hot" question of extended warranties in the automobile field, the province has to consistently redo anything done first by Ottawa. While there may be justifications for each of the instances of this nature raised by the Deputy Ministers, it is significant that this is the perception of some of them on "street level" issues.

Federal officials based in Ottawa do have their own version, their own "horror stories" of relations. We were told that one provincial official in particular "referred a number of matters in which there was no possibility that a conviction could be obtained, and in some cases in fact raised no question under the Act". Another official tended to refer cases for which the province had no answer without there being any necessary relationship to the federal legislation.

It should, in fact, be borne in mind that these examples are isolated and that federal-provincial relations ought not to be viewed solely in the "warm" reflection of the given instances.

Of more significance, no doubt, is the provincial perception of co-operation at the policy level. In a word, it is negative. Furthermore, it is the most common and uniform of the perceptions. One of the Deputy Ministers explained the problem by saying that it is very difficult to get all 10 provinces in agreement on any consumer issue but that they were in unanimity at the Saskatoon conference in the fall on the issue of the lack of consultation on the proposed borrowers protection legislation.

The matter has been put in various ways. One Deputy Minister observed "their whole consultation process leaves a great deal to be desired". Another spoke more strongly. He said that consultation "had not yet been tried". It is true that a great deal of this bad feeling over the consultative process has arisen in connection with the credit legislation but one Deputy Minister explained that there had not either been any consultation before Bill C-2 had been introduced. Others explained that the federal notion of consultation meant a quick trip around the country for a member of the Department, stopping for an hour or two to explain the contents of the legislation within a week of First Reading.

While it is true that the federal government has not made any substantial efforts to consult with the provinces before developing legislation in areas which the provinces consider close to their hearts, it is also fair to observe that consultation ought to be a two-way street. To the best of our knowledge, there was no consultation emanating from the provinces when they began to introduce their trade practices legislation. To this suggestion, one Deputy Minister replied that he viewed

the area as one which was eminently within the jurisdiction of the provincial government and which therefore did not require any dealing with Ottawa prior to the introduction of the legislation. This could hardly be said to be a fair-minded view when one considers that substantively, if not terminologically, the federal government has been involved in the trade practices area since 1960, not to mention the fact that, on the constitutional plane there are legitimate doubts to be raised as to the impermeability of the provincial trade practices laws.

What is true is that there has been a poor dialogue between the provincial and federal authorities in the consumer protection area and that improved communication will have to take place before the introduction of any federal trade practices legislation becomes a fait accompli, failing which there would likely be an uproar similar to that which arose in the borrowers protection case.

As far as the trade practices legislation itself is concerned, the Deputy Ministers appear quite resigned to the fact that uniformity of such legislation at the provincial level from coast to coast is unlikely. Most Deputy Ministers were willing to concede that the idea might be attractive but that it would be difficult or impossible to achieve. What generally tends to happen in the case of a consumer protection statute is that one or two provinces will take the initiative in the development of such legislation, whose style and form may generally be followed by other provinces. They will, however, add refinements as they enact similar laws, generally for the purpose of improving the statute (by closing loopholes or eliminating unduly burdensome provisions). Sometimes, it must be admitted, the "refinements" are retrogressive, where the attempt is made to tone down progressive provisions for local or political reasons. One can also see, in the diversified approaches of British Columbia and Alberta to the

same subject, how difficult it would be to get all 10 provinces in agreement on issues of substance and procedure.

Insofar as federal activity in the area is concerned, the views vary considerably. One can assume that the provinces with no legislation in the area (and none projected) would be quite willing, if not eager, to welcome a continued federal presence. Some bureaucrats liked the idea of the national issues and concerns remaining with the federal government while the provinces retain matters of a local nature.

One of the Deputy Ministers objected even to this approach, saying that the federal government ought to be fulfilling that role now and was not doing so. Most of the current misleading advertising prosecutions, he observed, were of a local and not of a national nature. He also indicated that his department would be unlikely to want to ignore a national unfair trade practice being perpetrated in his province because, to that extent, it affected the public to which he was responsible. In fact, two of the Deputy Ministers favoured total federal government withdrawal from the area, leaving it in the hands of the provinces. One of these even suggested that, if there were insufficient funds available, the federal government ought to take the political decision to make the necessary financial arrangements to permit the continuation of such programs by the provinces.

The most stringent objection to federal presence in the trade practices area centred around the possibility that the federal department could become involved in the developing of civil sanctions or remedies such as restitution or rescission of contracts. Most of the officials took the view that civil remedies would be unconstitutional and that, accordingly, there was nothing further which need be said on the subject. Although it was not expressed, one can assume that the provinces would

see the addition of such sanctions as a real threat to their dominance or meaningfulness on the local basis.

The reaction of the Deputy Ministers weakened only slightly when they were faced with the proposition that there might be a division of enforcement activities along national or interprovincial versus intraprovincial lines. In such circumstances, it would not seem fair or reasonable from the point of view of the consumers affected that they would receive benefits when a company had carried on an unfair trade practice on an intraprovincial basis but would lose those when the activity was more wide-spread (occurring in two provinces or even across the country). Even in those circumstances, the resolve of the Deputy Ministers remained quite strong.

In addition to the interviews conducted with the provincial bureaucrats, interviews were conducted with regional federal personnel in the areas visited. A few words regarding their perception of their current role and its possible future might be instructive.

Generally speaking, the investigators with whom we spoke were enthusiastic about their work and expressed the hope, more than anything else, that decentralization will come into full flower, thereby permitting them to move more quickly and to provide the kind of service which they feel the provinces are able to grant.

In this connection, they were also concerned with the absence of sanctions providing compensation or restitution. As one individual put it, "the Combines Act is not meaningful to the housewife."

Most also felt a strong need to be able to deal directly with the advertisers. They felt that considerably more could be achieved by their having

the flexibility to visit advertisers and to explain the working of the act to them. The argument was essentially of the "stitch in time saves nine" variety.

It was interesting that most of the investigators felt quite free about meeting with their provincial counterparts and most indicated that they did so on a fairly regular basis. They suggested that meetings were easier at this level than at the higher managerial levels and that relations, while they depended upon compatible personalities, were generally good. Some of this is understandable since most of the investigators in both the provincial and regional federal officer are former Royal Canadian Mounted Police or members of the local constabulary.

In sum, it is clear that the pressures on Ottawa come from two sources, from the field officers and from the provinces. The field officers want more autonomy and remedies which will be meaningful to consumers while the provinces would generally like less of the federal presence and exclusive retention of the civil remedies. There is also a substantial need for fence-mending at the policy level and the encouragement of communications at all levels of activity.

III CONSTITUTIONAL ASPECTS OF THE PROBLEM

To seriously undertake a constitutional analysis of a projected statute, it is almost essential to have a draft in hand (as we observed in the Foreword). We are not in such a position although we are aware of the broad outlines of the areas to be tackled in the proposed Trade Practices Act. These are dealt with in depth throughout the Trebilcock study and are summarized in its last chapter. For our purposes, we can state briefly that the proposals broadly resemble the British Columbia and American models and that they include:

1. ordinary criminal law sanctions of incarceration and financial penalties;

2. civil damages, compensation or restitution to the injured party or parties;

3. divestment of profits earned by breach of the provisions of the Act;

4. other civil remedies such as rescission and modification of contractual terms;

5. interim injunctions or cease and desist orders;

6. assurances of voluntary compliance;

7. regulation-making power;

8. the possible vesting of some or all of these powers or sanctions in the hands of the Federal Court or a tribunal established under the Act (perhaps even the Restrictive Trade Practices Tribunal), and

9. the role of the Director in the mediation process.

Before proceeding to a discussion of the proposed federal Act and its constitutionality, we should glance briefly at the validity of the provincial trade practice laws.

Although this study is primarily concerned with the political and constitutional considerations underpinning the proposed federal legislation, it is fair to consider that the various provincial trade practices statutes are not themselves free, at this early stage in their lives, from possible constitutional challenge. Therefore, before considering the validity of the various federal provisions mentioned above, we shall briefly turn our attention to the three trade practice acts (which we will deal with on a global, rather than a section-by-section, basis).

The Provincial Trade Practices Laws

The first step to be taken in any analysis of the constitutional validity of the provincial laws, as in the case of any statute, is the characterization of it. Is its pith and substance within the provincial or the federal domain? In the case of the Alberta law, there are no penalties attached to any of the unfair trade practices and it is unlikely that the legislation would be viewed as anything other than the regulation of contracts or of particular trades or business (or trade generally) within the province. In that case the familiar rule in Parsons case* would apply:

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* Citizens Ins. Co. of Canada v. Parsons (1881) 7 App. Cas. 96.

> (T)o legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.*

That point would appear to be beyond dispute now and may even have been moderately strengthened by the holding of Martland, J. in the Carnation case** that, "the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control."*** The heads giving support to these constitutional conclusions are, of course, sections 92(13) and 92(16) of the BNA Act.

Where, however, the legislation (as in the cases of Ontario and British Columbia) consists in specific prohibitions to which significant penalties are attached, the solution may not be as apparent. There the legislative provisions smack of criminal law and, while it is true that the provinces have authority, by virtue of section 92(15) of the BNA Act, to make laws in relation to "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this

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* Ibid., at p. 113. See also In re The Insurance Act of Canada (1932) A.C. 41, at p. 45, per Viscount Dunedin; and A.-G. British Columbia v. A.-G. Canada (1937) A.C. 377, at p. 387, per Lord Atkin; among others.

** Carnation Co. v. Quebec Agricultural Marketing Board (1968) S.C.R. 238.

***Ibid., at p. 253.

Section", the authority to impose such penalties is ancillary. That is to say, the ability to penalize a person for breaching the terms of a statute is only as valid as the statute itself. When one considers that the federal government had occupied the trade practices field for some 15 years before the provinces introduced their laws, it is arguable that a Court could interpret the penal provisions in such statutes as trenching upon the federal criminal law power. We ought not to be interpreted as adopting this view ourselves but the possibility of such an interpretation exists.

The other possibility would be the characterization of the British Columbia and Ontario trade practice laws as comprising essentially the regulation of undesirable forms of trade practices within the province (as suggested above, in the case of Alberta). This, we would submit is the more likely (although not certain) outcome for the favourable attitude of the courts toward provincially-enacted consumer protection legislation has been demonstrated.* In the Benson and Hedges case** Mr. Justice Hinkson upheld the validity of two British Columbia statutes prohibiting the advertising of liquor and tobacco in the province. It is true, on the other hand, that the Quebec Court of Appeal has recently upset the Quebec regulation of

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* This prognosis gains strength from the Supreme Court's judgment in the Vapor case and Chief Justice Laskin's emphasis on the severance of private law remedies from public law sanctions where the conduct in question only involves intraprovincial transactions.

** "Benson and Hedges (Canada) Ltd. v. A.G. - British Columbia" (1972) 6 C.P.R. (2d) 182, 27 D.L.R. (3d) 257.

advertising intended for children* but the decision is currently under appeal and, it should be pointed out, the regulation was declared ultra vires on the grounds that it trenched upon the federal government's authority in the field of broadcasting, an issue not of concern to us in this study.

The principal case supporting provincial consumer legislation is, of course, the Barfried Enterprises case** which upheld Ontario legislation dealing with harsh and unconscionable transactions which may, to some, have appeared to be legislation in relation to interest, a matter of federal competency. Both Judson, J. and Cartwright, J. went out of their way to describe the legislation as related to the "annulment or reformation of contract"*** or the enlarging of "the equitable jurisdiction to give relief against harsh and unconscionable bargains",**** respectively.

Assuming, as we do, that the courts are very likely to hold the acts valid as legislation in regard to property and civil rights or matters of a local and private nature, it remains to be seen whether there are other grounds upon which they

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* Unreported as of the date of writing. Details concerning the regulation and a prior comment on its constitutional validity can be found in Cohen, "Advertising to Children: The Constitutional Validity of Quebec's Regulation" (1974) 12 C.P.R. (2d) 173.

** A.-G. Ontario v. Barfried Enterprise Ltd. (1963) S.C.R. 570.

*** Ibid., at pp. 577-8.

**** Ibid., at p. 579.

could be challenged. These would seem to be limited to the extra-territorial effects, if any, of the legislation, the extent of the penal sanction, or the existence of a conflict between the provincial act and the Combines Investigation Act. Insofar as extra-territoriality is concerned, scope is not mentioned in any of the three acts referred to and they are therefore presumed to have effect only within the provincial borders.* A mere incidental effect on the business of an interprovincial company, as in the Carnation case** will not be grounds for the invalidity of the legislation although a direct trans-border effect may be.***

If, as we suggest, the legislation does not aim at extraterritorial or interprovincial regulation and therefore is valid insofar as sections 92(13) and 92(16) are concerned, then the imposition of penalties and/or imprisonment under the British Columbia and Ontario statutes will not thereby invalidate them. The sanctions included in these acts fall readily within the competence of the province. The fact that, in the case of the British Columbia statute, the fines are extremely high in the case of corporations does not thereby invalidate the legislation on the grounds that it partakes of the criminal law. "(I)n other words, it cannot be argued that the thing prohibited is

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* See Reference re sec. 31 of the Municipal District Act Amendment Act, 1941 (1943) S.C.R. 295, at p. 302, per Duff, J.

** (1968) S.C.R. 238. See also R. v. McKenzie Securities Ltd. (1966) 56 D.L.R. (2d) 56.

*** See Interprovincial Co-operatives Ltd. v. The Queen (1975) 53 D.L.R. (3d) 321 (S.C.C.).

brought within the range of the criminal law merely by reason of the high nature of the punishment which may be injected upon the offender..."*

There remains the question of repugnancy. The well-known trilogy of Supreme Court decisions in 1960 provide an indication of the extent to which the Supreme Court is prepared to support the existence of concurrent operation of similar legislative provisions at the provincial and federal level. Professor Laskin, as he then was, described those three cases in his well-known article on paramountcy:**

> O'Grady v. Sparling sustained the validity of a provincial penal proscription of careless driving, as part of a comprehensive statute regulating highway traffic, despite the valid presence of a federal enactment defining and punishing the offense of criminal negligence in the operation of a motor vehicle.***
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> Stephens v. The Queen upheld the validity of another common provision in provincial highway traffic legislation, one punishing failure to remain at or immediately to return to the scene of an accident, and this in the face of a valid federal criminal enactment punishing failure to

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* R. v. Wason (1889) 17 O.A.R. 221, at p. 240 per Osler, J.A.

** Bora Laskin, "Occupying the Field: Paramountcy in Penal Legislation" (1963) 41 Can. Bar Rev. 234.

***(1960) S.C.R. 804.

> stop at the scene of an accident with intent to escape civil or criminal liability.*
>
> Smith v. The Queen supported a penal prohibition of the furnishing of false information in a prospectus, being part of a general provincial scheme of regulation of the securities business, although there was in existence a federal Criminal Code provision punishing the making or publishing of false statements in a prospectus with intent to induce persons to become shareholders of or advance money to, or enter into any security for the benefit of the company.**

Laskin's conclusion more than a decade ago was that, in the absence of an "operating incompatability" in the particular situation, there was no reason to apply the test of paramountcy.

> Given legislation of a province and legislation of Canada which, independently considered, is valid, why should there be any occasion to speak of supersession or preclusion except in the case of conflict in their actual operation, as where the province purports to permit what Canada categorically prohibits?***

A more recent decision of the Supreme Court suggests that, in the interests of accommodating federalism, the 1960 trilogy may not even have

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* (1960) S.C.R. 823.

** (1960) S.C.R. 776.

***Laskin, op. cit., at p. 243.

stretched the bounds of the possible. In Ross v. Registrar of Motor Vehicles,* the appelant was convicted under section 234 of the Criminal Code of driving while impaired. He was fined $200 or 15 days in jail. He appealed the sentence, which was varied to provide a partial driving prohibition for a period of six months pursuant to section 238(1) Cr. C. The order made also provided that Ross' driver's licence was not to be suspended and the Registrar of Motor Vehicles was to be provided with the order. Under section 21 of the Highway Traffic Act,** Ross' licence was in any case automatically suspended. Appellant accordingly instituted proceedings to obtain a declaration that section 21 of the Highway Traffic Act was inoperative and that his suspension was of no effect. The majority found no repugnance. Nor any "operating incompatibility" (although no reference was made to Professor Laskin's article or to the term he coined therein).

> The direction that Ross' operator's licence was not to be suspended shows that the Judge who made the prohibitory order considered not only that the prohibition may be limited as to time and place, but also that the person to whom the order is directed should enjoy the right to drive at a specified time and place, irrespective of provincial legislation concerning the suspension of driving privileges. In terms, the Criminal Code merely provides for the making of prohibitory orders limited as to time and place. If such an order is

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* (1974) 42 D.L.R. (3d) 68 (S.C.C.).

** R.S.O. 1970, c. 202.

> made in respect of a period of time during which a provincial licence suspension is in effect, there is, strictly speaking, no repugnancy. Both legislations can fully operate simultaneously. It is true that this means that as long as the provincial licence suspension is in effect, the person concerned gets no benefit from the indulgence granted under the federal legislation.*

In a further statement which must give food for thought in connection with the constitutionality of certain proposed federally legislated sanctions, Pigeon, J. added the following comments:

> It should now be taken as settled that civil consequences of a criminal act are not to be considered as "punishment" so as to bring the matter within the exclusive jurisdiction of Parliament.**

The Federal Trade Practices Law

We have given earlier a kind of resumé of some of the new sanctions and provisions of the suggested Trade Practices Act. Just as we indicated some difficulty in characterizing the provincial legislation as falling clearly within sections 92(13) and 92(16), so too do we find it difficult to characterize the proposed federal legislation as being unquestionably criminal law. When so many

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* (1974) 42 D.L.R. (3d) 68, at p. 79 per Pigeon, J.

** Ibid., at p. 80. On the question of repugnancy, see also "R. v. Young" (1974) 42 D.L.R. (3d) 622 (Ont. C.A.) and "R. v. Nakashima" (1975) 1 W.W.R. 673.

civil or administrative sanctions are added to what was unquestionably formally a criminal law statute, do these additions so dilute the criminal intention of the legislation that the law ceases to be fundamentally criminal in nature? At what point, in other words, does the tail begin to wag the dog?

The question has, of course, previously been raised. As Lord Atkin stated in Proprietary Articles Trade Association v. A.-G. Canada,*

> It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support on the whole Act. The remedies given under ss. 29 and 30 reducing customs duty and revoking patents have no necessary connection with the criminal law and must be justified on other grounds.**

It is impossible for us to draw the line, to know when the constitutional Rubicon has been crossed but we raised the issue as one which must be seriously considered in the drafting of such legislation. Should the act as a whole be seriously put in question, three options would arise. First, it might be considered criminal law in pith and substance, all of the civil or administrative sanctions being incidental, in which case legislation would be upheld. Secondly, the legislation

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* (1931) A.C. 310.

** Ibid., at p. 325. See also the recent decision of the Supreme Court in the Vapor case where Laskin, C.J.C., observes inter alia that, in that case, "the attempt to mount the civil remedy of s. 53 of the Trade Marks Act on the back of the Criminal Code proves too much".

might be held to be the regulation of trade in pith and substance and ruled valid or invalid in accordance with the then prevailing view regarding section 91(2) of the BNA Act. Thirdly, the act might be viewed as being criminal in pith and substance but, as suggested by Lord Atkin, the additional civil or administrative sanctions might have to be justified under another head, most suitably trade and commerce, and they would stand or fall on that basis.

We deal with the question of trade and commerce below and we will, accordingly, look immediately to the question of the role of the criminal law as possible support for the projected legislation.

The proposed federal legislation may, as indicated above, be viewed as being in pith and substance an exercise of the criminal law power, criminal legislation being defined as "a general condemnation entailing sanctions".* As the Judicial Committee observed in A.-G. Ontario v. Hamilton Street Railway,** "... the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament".*** After some early hesitation on the subject, it has become certain that Parliament can determine what acts are crimes, provided that the attempt at definition is not colourable.****

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* Blair, "Combines, Controls or Competition?" (1953) 31 Can. Bar Rev. 1083, at p. 1091.

** (1903) A.C. 524.

*** Ibid., at p. 529, per Halsbury, L.C.

**** Reference re Validity of s. 5(a) of the Dairy Industry Act (1949) S.C.R. 1, at pp. 49-50, per Rand, J.

> ... if Parliament determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes... (The criminal law) is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?... It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.*

While there can be little doubt about the authority of Parliament to create offenses to form a part of the new trade practices law, even where these may fall into the category described by Trebilcock and associates as "disclosure-related" offenses (although, for reasons of rationalization

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* Proprietary Articles Trade Association v. A.-G. Canada (1931) A.C. 310, at pp. 323-4.

of approach, they may prefer that these not fall into the criminal domain), more serious questions must be raised as to the sanctions themselves. As Lork Atkin stated in the Proprietary Articles Trade Association case, the remedies in sections 29 and 30 of the Act then under consideration which gave the authority to reduce customs duties and to revoke patents "have no necessary connection with the criminal law and must be justified on other grounds".*

That decision is now almost half a century old and there are reasons to believe that the statement of Lord Atkin may not be of general applicability. In A.-G. Ontario v. Canada Temperance Federation** 15 years later, Viscount Simon stated: "To legislate for prevention appears to be on the same basis as legislation for cure."*** That holding was followed in the well-known Goodyear case**** in which the validity of the prohibition order was upheld. Mr. Justice Locke held that the power to legislate in the criminal law was not limited to the definition of offenses and the providing of penalties. "The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime."***** There follows a strong expansion of that suggestion in the judgment of Rand, J.

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* Ibid., at p. 325.

** (1946) A.C. 193.

*** Ibid., at p. 207.

**** Goodyear Tire and Rubber Co. v. The Queen (1956) S.C.R. 303.

***** Ibid., at p. 308.

> It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offenses nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable.*

The statement is purposely generalized and, notwithstanding the oft-repeated dictum of Lord Halsbury in Quinn v. Leatham,** would appear by the very force with which it is put to contain a message with respect to the prohibition order and other sanctions which might follow to combat the growth of economic crime (which was clearly the purpose of sections 29 and 30 of the Combines law then under attack). On the other hand, to interpret that paragraph as granting carte blanche for the introduction of any parliamentary whimsy would not either be seriously arguable. The trick is to find the happy middle way.

In that connection, it is worth making reference to the provisions of the Criminal Code which provide sanctions of other than a traditional penal nature. The relevant articles of the Criminal Code are 653, 655 and 663, all of which permit the making of an order of a "civil" nature. In the case

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* Ibid., at p. 311. Emphasis added.

** (1901) A.C. 495, at p. 506.

of the first article, the Court may order the accused to compensate an aggrieved person who applies to the Court for such an order at the time of sentencing of the accused who must have been convicted of an indictable offense.

In the case of article 655, it is not necessary for anyone to make the application. The Court has the right to order that any property obtained by the commission of the offense be returned to its rightful owner. Article 663 provides that the Court may suspend the passing of sentence in favour of the making of a probation order, in which either compensation or restitution may be ordered. It is not necessary that the offense be indictable although guilt is a prerequisite. The order made under any of these sections is defined by section 601 as being a part of the "sentence" although it is important to observe that, even where the conviction is quashed on appeal, the court of appeal may vary or annul the order (or, by reason of the use of the facultative word, "may", presumably maintain the order as made.*

The provision in section 653 has been challenged on constitutional grounds, but not successfully and not to the level of the Supreme Court. Notwithstanding the holdings in the following cases and the legitimate premise of the section which aims its Criminal Code thrust as much at rectifying the wrong done as at punishment of the wrongdoer, we submit that it may be risky to conclude that section 653 is clearly intra vires without the expressed views of the Supreme Court. In R. v. Cohen and Miller** the Manitoba Court of Appeal maintained that the predecessor section was incidental to the exclusive authority of Parliament

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* See sec. 616(2) Cr.C.

** (1932) 38 C.C.C. 334.

over criminal law and was, therefore, intra vires. Such an order was also upheld in R. v. Graves and Rose* in which the accused was convicted of breaking and entering and was ordered to pay the victim more than $4,000. In hearing the application for a writ of certiorari, Mr. Justice Haines held that it was a valid object of sentencing to prevent convicted criminals from profiting from a crime by keeping the gains of their unlawful acts. The judge went on to say that the section does not purport to abolish the substantive rights of the victim or to create a new cause of action. Its purpose, in effect, is to create a modality of sentencing.

If we were only to apply the reasoning of Rand, J., in Goodyear to the preceding statements regarding the criminal law power and the succeeding decisions relating to sec. 653 Cr. C., we would be left with little doubt that compensation and the divestment of profits would be valid incidents of the exercise of the criminal law power by Parliament. Nor can Vapor be said to impugn either this suggestion or the validity of section 653 Cr. C. since it was basically concerned with the creation of an independent private right of action. On the other hand, some may feel that Laskin, C.J.C.'s comments on the criminal law power sufficiently jog the foundations that the courts may wish to re-examine the 653 question.

Such residual relief as rescission and modification are more problematic. We are not convinced that these could be sustained as valid incidents of criminal legislation because of contract's traditional place in the constitutional framework. In addition, any court ruling of this ilk would be retrospective and however widely Goodyear may be worded, it would seem that the injunctive authority

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* 9 C.R. 365, (1950).

of the Court's order is prospective. Even the interim injunction of Bill C-2 is of that nature, the essential difference being the lack of prior conviction but the prevention of criminal behaviour remains the goal of both.* Rescission and the modification of contracts are, as mentioned, retrospective and could only be supported as part of federal legislation insofar as they could be seen as incidents of the sentencing process. Support for such sanctions at the federal level, if any can be found, will be in the trade and commerce area.

New light has been shed on the criminal law area by the Supreme Court in the recent Vapor decision. Goodyear has apparently been curtailed to some degree. In Vapor, the Chief Justice emphasized the necessary connection of the prohibitory order "with a conviction of a combines offence".** He then described the earlier case as illustrating "the preventive side of the federal criminal law power to make a conviction effective".*** He continued:

> It introduced a supporting sanction in connection with the prosecution of an offence. It does not, in any way, give any encouragement to federal legislation which, in a situation unrelated to any

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* Doubt regarding the validity of the C-2 interim injunction, which may be exercised independently of criminal proceedings, has now been raised by the Vapor case (pp. 10-11) although the Combines Act injunction is a public, not a private, enforcement tool.

** Ibid., at p. 10. Emphasis added.

***Ibid., at p. 11. Emphasis added.

> criminal proceedings, would authorize independent civil proceedings for damages and an injunction.*

The Court has not, in other words, left the concept of "new modes of enforcement and punishment adapted to the changing conditions" as open-ended as Rand, J., put the proposition in 1956.

On the other hand, Vapor ought not to be seen to decide more than its facts would permit. It must not be forgotten that the Court was examining the conferring of an independent right of action upon private subjects acting inter se and not upon the public authority regulating them. This situation clearly differs from that in which additional sanctions of a non-criminal nature are conferred upon the public authority as part of a regulatory scheme. That, of course, is the nature of the proposals put in this paper.

This is not to conclude that the difference between the trade marks and trade practices schemes will lead to an inescapable conclusion of constitutional validity. On the other hand, we wish to make it clear that, in our view, Vapor is very far from fatal to the tenets of the Trebilcock scheme examined here.

Throughout the course of the preceding discussion relating to the criminal law, we have purposely left the impression that, in our view, the bulk of the provisions suggested in the Trebilcock model could be supported as being valid criminal legislation or as valid incidents of the exercise of the Dominion's right to legislate in the area of criminal law. We did, however, suggest the possibility that a Court might characterize the legislation differently. It could be that a Court would

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* Ibid.

either characterize the legislation as being in pith and substance related to trade and commerce, in which case it would remain to be seen whether it would fall within the bounds of section 92(2), or as being in pith and substance criminal law but requiring, as in the P.A.T.A. case, support under other heads of constitutional authority including, in all likelihood, the trade and commerce clause. Unless restricted to interprovincial transactions, we consider it unlikely that the legislation would be broadly characterized as being legislation solely in relation to trade and commerce. Should that, however, occur (without an interprovincial restriction in the legislation), the act would not necessarily fall if, in Vapor's terms, it could be seen "in the context of a regulatory regime subject to supervision by a public authority".* In other words, the establishment of "a set of general rules as to the conduct of businessmen in their competitive activities in Canada" which was upheld by Jackett, C.J., in the Federal Court of Appeal in Vapor** is insufficient outside of a regulatory scheme evidencing genuine concern with national standards of uniform public application. We would also cite in support of such pro-free and fair competition legislation the conclusions reached by Grover and Hogg and others who have concluded that

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* Ibid., at p. 13. See also pp. 23 and 25-26.

** "Vapor Canada Ltd. v. MacDonald" (1973) 33 D.L.R. (3d) 434 (F.C.), at p. 449.

the time has arrived for Canadian competition legislation to find room for its support within the bounds of section 91(2) of the BNA Act.*

Without rehashing all of the case law, we might point to a few of the highlights in the jurisprudence in the studies in detail by the various authors to whom reference has been made. In general, it is probably fair to say that the anticentralist approach of the Privy Council is in the process of being rejected. Insofar as the cases involving provincial legislation are concerned, several recent cases have declared Manitoba legislation ultra vires the province on the ground that they had extraprovincial effect. In A.-G. Manitoba v. Manitoba Egg and Poultry Association** Martland, J., stated that in his opinion "the Plan now in issue not only affects interprovincial trade in eggs, but... it aims at the regulation of such trade".*** As Laskin, J. put it, the scheme was "not saved by the fact that the local market is under the same regime".**** Mr. Justice Laskin also observed:

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* Grover and Hogg, The Constitutionality of Proposed Amendments to the Combines Investigation Act (May 1975 unpublished), pp. 33-53. See also Smith, The Commerce Power in Canada and the United States (1973), at p. 181; McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcements" (1969), 47 Can. Bar Rev. 161, at pp. 236-7; R. Gosse, The Law on Competition in Canada (Toronto 1962), at p. 253 and D. Blair, "Combines: The Continuing Dilemma", in Lang (ed.), Contemporary Problems of Public Law in Canada (1968) at p. 161.

** (1971) S.C.R. 689.

*** Ibid., at p. 703.

**** Ibid., at p. 717.

> There may be a variety of reasons which impel a province to enact regulatory legislation for the marketing of various products. For example, it may wish to secure the health of the inhabitants by establishing quality standards; it may wish to protect consumers against exorbitant prices; it may wish to equalize the bargaining or competitive position of producers or distributors or retailers or all three classes; it may wish to ensure an adequate supply of certain products. These objects may not all nor always be realizable through legislation which fastens on the regulated product as being within the province. That is no longer if it ever was, the test of validity.*

A similar ruling in Burns Foods Ltd. v. A.-G. Manitoba** upset a Manitoba regulation requiring processors of hogs in the province to slaughter hogs there unless these were purchased from the provincial Board set up to control the market.

> If the federal Parliament cannot regulate local trade because it would be more efficient to regulate it together with extraprovincial trade, a fortiori a provincial legislature cannot regulate interprovincial trade in a given product because this appears desirable for the effective control of intraprovincial trade. In other words, the direct regulation of interprovincial trade is of itself a matter outside the legislative

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* Ibid., at pp. 715-6.

** (1974) 40 D.L.R. (3d) 731 (S.C.C.).

> authority of any province and it cannot be treated as an accessory of the local trade.*

Finally, in the Dryden case** the Supreme Court held that, although the provincial legislatures may be entitled to deal on an exclusive basis with the effects of pollution, the Legislature of Manitoba could not declare wrongful those acts, even of a polluting nature, which in another province were not actionable torts at all, acts which, it should be added, took place outside Manitoba.

If the problem of trade and commerce be looked at from the point of view of the validity of federal legislation, one also sees significant encouraging signs. In Murphy v. C.P.R.,*** Locke, J. stated that it was "obvious that it would be impossible for Parliament to fully exercise the exclusive jurisdiction assigned to it by head 2 and many others of the heads of s. 91 without interferring with property and civil rights in some or all of the provinces".**** This approach was substantially followed in Caloil Inc. v. A.-G. Canada***** in which a section of the National Energy Board Regulations was upheld.

> It is clear, therefore, that the existence and extent of provincial regulatory authority over specific trades within the

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* Ibid., at p. 737.

** (1975) 53 D.L.R. (3d) 321 (S.C.C.).

*** (1958) S.C.R. 626.

**** Ibid., at p. 632.

*****(1971) S.C.R. 543.

> province is not the sole criterion to be considered in deciding whether a federal regulation affecting such a trade is invalid. On the contrary, it is no objection when the impugned enactment is an integral part of a scheme for the regulation of international or interprovincial trade, a purpose that is clearly outside provincial jurisdiction and within the exclusive federal field of action.*

In the Manitoba Egg Marketing case** Mr. Justice Laskin, as he then was, stated that a "reduction of (the) all-embracing authority" of Parsons had been developing in a Supreme Court and that "(a) necessary balance has been coming into view over the past two decades".*** It remains for the Court to determine for us where this "necessary balance" will be struck. It should also be pointed out that, however interesting all of the cases cited by us and by the other authors mentioned before may be, it is likely, in the words of the Chief Justice in the Vapor case,**** that "few of them will bear on the problem in hand".***** The key was expected in the decision to be rendered by the Supreme Court in this case for it would be the first statement of this Court's determination of the "ambit of Parliament's power to make laws under s. 91(22) for the general regulation of trade affecting the

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* Ibid., at p. 550.

** (1971) S.C.R. 689.

*** Ibid., at p. 707.

**** "Vapor Canada Ltd. v. MacDonald" (1973) 33 D.L.R. (3d) 434 (F.C.).

*****Ibid., at p. 443.

whole country".* In this respect the Court of Appeal had gone quite far.

> Against the background of these authorities, my conclusion is that a law laying down a set of general rules as to the conduct of businessmen in their competitive activities in Canada is a law enacting "regulations of trade as a whole or regulations of general trade and commerce within the sense of a judgment in Parsons case". From this point of view, I can see no difference between the regulation of commodity standards and a law regulating standards of business conduct; and, in my view, if there is anything that can be general regulation of trade as a whole it must include a law of general application that regulates either commodity standards or standards of business conduct.**

In the end, the Supreme Court only resolved a part of the issue. The justices made it clear that they would not support as sweeping a proposition as that part by Jackett, C.J. Because of the nature of the legislation they were examining, however, they were unable to indicate how far they would go to establishing the "necessary balance" between provincial powers and an increasingly influential trade and commerce power.

The Court did, however, leave two doors at least partially open. They spoke, first, of legislation of an "interprovincial or transprovincial

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* Ibid., at p. 447.

** Ibid., at p. 449.

scope"* which gives strength to our view that federal regulatory authority could be supported on an interprovincial basis for the issuance of interim injunctions or cease and desist orders, the negotiation of assurances of voluntary compliance and the participation of the Director in the mediation process. Quaere however, whether the federal government could, even under these circumstances, be viewed as having the ability to rescind or modify contractual terms.

As indicated above, the Court also left open the prospect of a valid regulatory scheme subject to supervision by a public authority even, it appears, where this may touch on intraprovincial activities.** Some hesitation or question arises when one reads the comments on the marketing cases*** but the criterion of "public regulation... applicable to the conduct of trading and commercial activities throughout Canada"**** in the case of credit is more on point, if not on all fours with the trade practices problems.

Insofar as the power to hear cases under this Act is concerned, the determination will depend to a substantial degree upon the characterization of the legislation. If the legislation is criminal in pith and substance, it will not then be clear that the authority of the federal government to constitute Courts for the better administration of the laws of Canada (sec. 101 BNA Act) will be able to

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* MacDonald, Lailquip Enterprises Ltd. v. Vapor Canada Ltd., at p. 14.

** Ibid., at pp. 13, 23, 25-26, 33, 34.

*** Ibid., at p. 32.

**** ibid. See also p. 33.

take precedence over the combined effect of sections 91(27) and 92(14) of the BNA Act. The issues have been canvassed by Grover and Hogg.* To the extent that the legislation may be seen as a valid enactment under the trade and commerce power, there is little question but that the powers to hear the cases and accord the sanctions could be granted to a federally constituted body, including the Federal Court.

Perhaps a final word on rule-making would be in order. It is our view that this definitional practice, already found in numerous federal statutes, is well within the authority of Parliament even if the legislation is of a criminal nature. The extreme example of such legislation is, of course, the Food and Drugs Act** which is essentially without meaning in the absence of the accompanying regulations.***

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* Grover and Hogg, Op. cit., at pp. 27-32.

** R.S.C. 1970, c. F-27.

***Such regulations were upheld in Berryland Canning Co. v. The Queen (1974) F.C. 91, 44 D.L.R. (3d) 568.

IV THE CONSTITUTIONAL DESIGN FOR A NEW TRADE PRACTICES ACT AND CO-OPERATIVE FEDERALISM

A. Introduction

The preceding chapters will have shown that significant constitutional and political issues arise, and will need to be resolved, in the framing of a new federal initiative in the trade practices area if major conflicts are to be avoided. To recapitulate briefly, there are three major hurdles, each of which is accompanied by a host of lesser difficulties: first, there is the as yet unresolved question whether it would be competent for the federal government to adopt a comprehensive trade practices act whose validity is based not solely on the criminal law power; secondly, assuming the constitutional questions can be answered satisfactorily, it is highly desirable that harmonious relations should be established between the federal and provincial governments in this important branch of consumer protection with a view to finding an acceptable formula for the exercise of legislative and administrative powers by the two levels of government; and thirdly, given the existing fact of concurrent legislation by the federal and provincial governments and the likelihood of an expanding number of provincial trade practices acts in the future, machinery needs to be devised to reduce the vexations of overlapping jurisdictions and the problems it could pose for the business community.

The present chapter addresses itself to these questions and explores a variety of possible solutions. Two preliminary observations are in order. The first involves the need for a sense of perspective. Constitutional conflicts arising out of the existence of overlapping or divided powers are not

new nor are they peculiar to Canada.* They are even more acute in such areas as securities regulation or agricultural marketing legislation. To the extent that solutions have been found in these fields they may provide models for possible solutions in the trade practices field. But the absence of an ideal solution need not cause chronic alarm. Federal systems of government almost definitionally engender some friction or tension and the object should be not to accomplish the impossible but to contain it within manageable bounds. Experience also shows that theoretical difficulties stemming from the existence of concurrent powers do not always manifest themselves in practice, or at least not with the intensity one would expect. This has been the experience in the U.S. in the trade practices field** and, for reasons we explain below, may also turn out to be true in Canada.

Our second observation concerns the possible suggestion that the best way of avoiding constitutional conflict is by maintaining the status quo and restricting the federal government to the exercise of its present criminal law powers. On its face, it seems an attractive solution since it would leave the provinces free to concentrate on those substantive and procedural aspects of trade practices regulation - unconscionable (as distinct from deceptive) practices, administrative and injunctive forms of law enforcement (for all forms of unfair or deceptive practices), and private law remedies - which have hitherto been absent from the federal legislation.

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* For a discussion of the American experience with such overlapping in a federal setting, see the Appendix to this chapter.

** Ibid.

In our view this approach is not acceptable.* Criminal law sanctions are only a technique for the enforcement of normative codes of behaviour and it is widely accepted that the criminal law on its own is not the most effective means, and it certainly should not be regarded as the exclusive means, of policing the market place. Other and more refined techniques are also necessary. If it is assumed (as we do assume) that the federal government has a necessary and legitimate role to play in the maintenance of an honest and fairly operating market place, then there is no more reason to deny the federal government resort to the full arsenal of sanctions and remedies than there would be in denying it to the provinces.

In any event, it is no longer true to say that the Combines Investigation Act is restricted to criminal law sanctions. The injunctive power under s. 30(2), although rarely used, has been in the Act since 1952,** and has been substantially expanded through the introduction in Bill C-2 of the interim injunctive provisions in s. 29.1. Bill C-2 now also confers private law remedies (s. 31.1) and, through the new functions vested in the Restrictive Trade Practices Commission, creates an important analogical basis for the regulation of unfair (as distinct from deceptive) practices.

There are also other arguments which militate in favour of an expanded federal role. There is no assurance that all the provinces, or even a majority of them, will adopt comprehensive trade

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* This is also the strongly held view of Trebilcock. See Supra p. i and the Foreword to his study cited at p. i of the Foreword to this paper.

** Added by 1 Eliz. II, S.C. 1952, c. 39, sec. 3.

practices legislation in the near future and, as our interviews have shown, even less assurance that those who have or will adopt such measures will have the resources or the incentive to make full use of their newly acquired powers.* The difficulties which would face the provinces, especially the smaller ones, in engaging in combat with large and powerful corporations prepared to spend much time, money and effort contesting enforcement proceedings need no elaboration.

The provinces may also lack the constitutional jurisdiction to regulate all or some forms of interprovincial or foreign advertising or advertising appearing in the broadcast media,** and, even in the absence of legal barriers, it may be difficult for the provinces to enforce the legislation against non-resident offenders. Against these difficulties there must be measured the now well-established federal presence in the policing of all forms of misleading advertising and the rich corpus of experience acquired by the federal authorities under the misleading advertising provisions of the Combines Investigation Act.

If we reject the suggestion that the federal role should be artificially restricted to the exercise of a particular technique, we find equally unacceptable, at the other end of the spectrum, the probably quite fanciful suggestion that the provinces should abdicate all responsibility in this branch of consumer protection law in favour of a pre-emptive federal law. As our interviews with

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* A survey of the available annual reports of the provincial departments of consumer affairs or consumer protection bureaux will readily show the disparity in financial resources and the different soci of their activities.

** Supra, p. 31.

the provincial officials have shown, those provinces which have adopted, or have expressed interest in adopting, trade practices legislation view it as an integral part of their consumer protection efforts and as politically attractive. It is difficult to fault the logic of this reasoning.

The contitutional difficulties make it in any event unlikely that a federal attempt to pre-empt the field would succeed, first, because of the continuing doubt with the respect to the scope of the federal trade and commerce power and, secondly, because of the pronounced tendency of recent judicial decisions to mitigate the rigours of the paramountcy clause in the BNA Act by invoking the double aspect of doctrine.

We support the spirit of co-operative federalism reflected in this philosophy (the double aspect doctrine), and it also informs the alternative models presented by us in the section which follows for harmonizing the federal and provincial interests in this area.

B. Alternative Models of New Federal Trade Practices Legislation

In Table 1 we have attempted to present in modular form some of the principal alternatives open to the federal government.

T A B L E 1

ALTERNATIVE MODELS OF FEDERAL TRADE PRACTICES LEGISLATION AND ITS ADMINISTRATION

1. Territorial Scope

(a) No restrictions

(b) Foreign and inter-provincial trade practices

(c) Exemption provisions for comparable provincial legislation:

(i) Total exemption
(ii) Partial exemption

2. Types of Trade Practices

(a) All forms of unfair or deceptive practices

(b) False or deceptive trade practices only

3. Rule Making Powers

(a) No powers

(b) Unrestricted powers

(c) Power restricted to specified types of trade practices

4. Remedies and Sanctions

(a) Public Law

(i) Criminal penalties only
(ii) No restrictions

(b) Private Law

(i) No explicit provisions
(ii) Expressly conferred (individual and class actions)

T A B L E 1 (cond't)

5. Administration of Legislation

(a) Type of Enforcement Agency

(i) Federal Trade Practices Branch, DCCA; and/or Trade Practices Commission; and/ or Federal Court of Canada

(ii) FTPB/FTPC; Federal Court; Provincial Courts

(b) Delegation of Powers

(i) No delegation

(ii) Delegation to joint federal-provincial Commission:
- (a) All administrative functions
- (b) Enforcement powers only
- (c) Allocational functions

(iii) Delegation to individual provinces
- (a) All administrative functions
- (b) Enforcement powers only

(iv) Delegation to federal government by individual provinces;
- (a) All administrative functions
- (b) Enforcement powers only

T A B L E 1 (cond't)

6. Consultative and Other Forms of Federal-Provincial Co-operation

(a) Type of Machinery	(b) Type of Program
(i) Formal	(i) Association of Trade Practices Administrators
(ii) Informal	(ii) Consultation with individual provinces
	(iii) Training of staff
	(iv) Statistical co-operation
	(v) Joint office facilities

As can be seen, they fall under six principal headings (territorial scope, type of trade practices, rule-making power, remedies, agencies of administration, and delegation of powers), each of which is divided into sub-categories. As a result on a theoretical level, it would be possible to construct several hundred models; however, the number of politically and administratively feasible alternatives is small and basically revolves around the territorial scope of the legislation and the delegation of regulation-making and enforcement powers. All these alternatives require legislative sanction and they are predicated on a close measure of federal and provincial co-operation. Column 6 envisages a consultative form of co-operative machinery, not involving any voluntary restraint of legislative powers and therefore much more loosely

knit in character, which can be considered either in conjunction with the legislative models or independently of them. Because it embraces the general rubric of federal and provincial relations in the consumer protection field, it will be convenient to deal with it in a separate section.

1. Territorial Scope of Legislation

(a) No territorial restriction. Column 1 in Table 1 posits three alternatives. The first involves no restrictions on the territorial scope of the federal legislation and corresponds to the present structure of the Combines Investigation Act. It therefore has the virtue of consistency with past tradition but its pre-emptive approach and its constitutional vulnerability would make conflict with the provinces almost inevitable unless the new act were to retain an essentially criminal law character. We have previously rejected exclusive reliance on the criminal law power as functionally unsound and we do not pursue the theme any further. An alternative possibility would be for the new act to retain the plenary scope of the criminal prohibitions and to couple it with administrative and regulatory powers and private law remedies which would be restricted to foreign and interprovincial transactions as suggested in (b) below. The advantages of this compromise are that it would enable the federal government to continue to provide Canadians in all provinces with a basic degree of protection against false or deceptive practices without depriving the provinces of the opportunity to enact additional protective legislation of their own.

(b) Act restricted to foreign and interprovincial trade practices and to activities, institutions, works and undertakings over which the federal government has specifically enumerated jurisdiction.

This compromise appeals on a number of important grounds. First, it appears to be on safe ground constitutionally since even the most conservatively oriented judgments construing the trade and commerce clause have conceded the federal government's power to regulate foreign and interprovincial trade. (We assume, correctly we believe, that "trade" includes the modalities of trade and that "trade and commerce" embraces the sale of services as well as tangible goods. In our view, the decisions upholding the validity of provincial securities legislation* are not inconsistent with this position since they involved no conflicting federal legislation whose constitutionality was being challenged.) There should likewise be no serious doubt with respect to the jurisdiction of the federal government to regulate the advertising practices of banks and broadcasting stations** and those interprovincial undertakings falling within sec. 92(10)(a) of the BNA Act.

In the second place, there are important domestic and foreign precedents for restricting the federal government's legislative powers in the

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* Eg., Lymburn v. Mayland (1932) A.C. 318; Gregory & Co. v. Quebec Securities Commission (1961) S.C.R. 584; R. v. W. McKenzie Securities Ltd. (1966) 56 D.L.R. (2d) 56 (Man. C.A.); and Smith v. The Queen (1960) S.C.R. 776.

** Cf. Kellogg's Company of Canada v. R., unreported at the time of writing.

suggested manner in such Acts as the Agricultural Products Marketing Act,* the Motor Vehicle Transport Act,** the Canada Labour Code,*** and, until its recent amendment, the Federal Trade Commission Act in the U.S.**** Again, discussions involving the desirability of a Canadian Securities Act are usually predicated on the assumption that the scope of the Act will be limited to interprovincial and foreign transactions.*****

Thirdly, the self-imposed restrictions would avoid the complaint that the federal authorities are usurping a provincial responsibility and focus the federal regulatory and enforcement energies where they are likely to have the greatest national impact.******

Against these advantages there must be balanced a number of greater or lesser disadvantages. One is that the existing Combines Investigation Act (including the amendments in Bill C-2) do not distinguish between intraprovincial and interprovincial trade practices and that to restrict the new

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* R.S.C. 1970, c. A-7.

** R.S.C. 1970, c. M-14, sec. 3.

*** R.S.C. 1970, c. L-1, sec. 2 and 4.

**** See "Note on the American Position", the Appendix to this chapter.

***** Eg., John Howard, Securities Regulation - Structure and Process (1975, unpublished), esp. at pp. 97 et seq.

****** We should not, however, be understood to say that all provincial objection would, even in such circumstances, be removed.

Trade Practices Act to interprovincial practices would create an invidious distinction between anti-trust violations and consumer protection measures. We are conscious of this difficulty and it may be that there is no completely satisfactory answer to it. Professors Grover and Hogg have, however, suggeted that a respectable argument can be made that anti-competitive practices usually have a national impact* and that, in the absence of a provincial interest to regulate its purely intrastate aspects, a unitary standard best serves the national interest. Whatever be the correct answer to the dilemma, we see no advantage in introducing further refining distinctions between different types of trade practices or the types of sanction to which they are subject (with the possible exception of trade practices subject to criminal law sanctions to which we have referred previously) and applying an interprovincial test to some and an unrestricted territorial scope to others.

A more formidable objection is perhaps the unsettled meaning of "interprovincial" for the purpose of the suggested statutory formula. While a succession of marketing cases** have delimited, and to some extent defined, the respective scope of the federal and provincial powers over intra- and interprovincial marketing schemes it is not clear to what extent the decisions would be applied and could serve as useful analogies in the very different milieu of trade practices. The marketing

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* The Constitutionality of Proposed Amendments to the Combines Investigation Act (May 1975, unpublished), pp. 5-10.

** Eg., Burns Food Ltd. v. A.-G. Man. (1974) 40 D.L.R. (3d) 731 (S.C.C.); A.-G. Man. v. Manitoba Egg and Poultry Assoc. (1971) S.C.R. 689; Re Farm Products Marketing Act (1957) S.C.R. 198.

decisions focus on the prospective or actual movemment of goods across provincial borders. These prototypes have ready counterparts in advertisements that circulate in several provinces, but it is not clear to what extent the interprovincial label would be attached to businesses operating in more than one province but with decentralized advertising departments whose efforts are confined to one province.

At our request the officials of the Department provided us with a list of the criteria which they would find it administratively convenient to apply in determining the national* character of a marketing practice:

1. The practice appears in the same or similar formation in more than one province.

2. The practice is directed, paid for, or made possible by the policies: (a) of a firm resident in Canada but not resident in the province where the practice affects a consumer; and (b) of a firm whose practice-related product is sold, directly or indirectly, to consumers in more than one province. (Residence for the purpose of this test means the head office of the advertiser.)

3. The practice has interprovincial effect on commerce.

Based on the first two criteria the officials derived the following crude estimates of the relative importance of "national" and "local"

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* A careful reading of the criteria suggests that "national" for departmental purposes and "interprovincial" for court purposes are less than synonymous.

advertisements in the trade practice complaints handled by the misleading advertising divison of the Department and the advertisements appearing in the broadcasting and print media:*

T A B L E 2

	National	Source
Misleading Advertising Division TP Files	53-58%	Sample of 100 Files TP 20,100 - TP 20,200
Misleading Advertising Division Prosecutions	22-27%	Sample of 71 cases. All cases appearing in court during 1973.
Television Commercials	78-89%	Maclean-Hunter Research (Dollar Sales)
Radio Commercials	50%	CFRA Sales Dept (Dollar Sales)
Newspaper Dailies and Supplements	48%	Toronto Star & Maclean-Hunter (Dollar Sales)

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* These were prepared for internal proposals and were not intended to be seen as statistically sound representations of distribution. As a rough or crude reckoner, they are, however, instructive.

The interpretation of the above criteria also led the officials to suggest that, for policy-making purposes, all national brand manufacturers' marketing practices, all practices by national retailers, and all practices by major supermarkets should fall under federal jurisdiction and that only intra-provincial practices by firms resident in that province and only carrying on business in that province should be excluded.

We are not competent to judge the administrative soundness of these criteria. We also have some difficulty in construing the precise meaning of criteria 1 and 3 in Table 2. It does seem clear however that the officials' perception of what constitutes a "national" or "interprovincial" advertisement goes beyond what is justified by the existing marketing jurisprudence although they might meet the much more generous test judicially accorded the interstate commerce clause in the U.S. constitution.*

We are conscious of this penumbara of uncertainty which the introduction of an interprovincial test in the new federal legislation could cause, but it seems to us unavoidable. Sooner or later the definitional problem would arise in any event under some type of non-marketing legislation based on an interprovincial test and it will also arise under the recent amendments to the Combines Investigation Act if the courts should hold that Part IV.1 is ultra vires insofar as the Part is not confined to interprovincial restrictive practices.

The position may therefore be summarized as follows. If the courts hold that the federal jurisdiction (apart from the special cases mentioned at the beginning of this section) is

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* Particularly under the Shreveport doctrine. See A. Smith, The Commerce Power in Canada and the United States (1963), c. 12.

restricted to interprovincial practices, the interpretation of interprovincial will have to await further judicial refinement. If the federal trade and commerce power is held not to be so restricted, it will be open to the Act, including any regulations adopted pursuant to the Act, to define the terms and indeed to adopt any other criteria of applicability that may appear to the Department to be consistent with the Act's overall objectives.

Several other possible objections to the suggested restriction on the territorial scope of the new Act should be noted. The first is that it could result in an unfortunate vacuum in those provinces which, at the time of the introduction of the new Act, do not have trade practices legislation of their own or the resources or interest to enforce it adequately. The statutory hiatus appears to us a less likely danger than varying standards of enforcement. We deal with the latter problem in a later section. We have already suggested one solution to the first problem. An alternative solution would be the adoption of an exemption provision whose effect would be to apply the federal Act without territorial restriction unless its applicability was restricted, by Order-in-Council or otherwise, in the case of a province which had adopted legislation of its own. This solution is predicated on a wider reading of the federal trade and commerce power than the reading we have previously assumed and it suffers from other difficulties to which we refer presently.

The second objection is that the adoption of an interprovincial or national criterion of applicability would not preclude the applicability of concurrent provincial laws given the courts' reluctance to find a functional incompatibility between similar federal and provincial legislation in other areas of overlapping jurisdiction. The short answer to this difficulty is that it is not peculiar to trade practices legislation (or to Canada)

and that the solution must be sought in a more realistic judicial attitude and in better federal-provincial co-operation in areas of concurrent jurisdiction. The difficulty would not be resolved through an attempt by the federal government to pre-empt the whole area of trade practices regulation even assuming it were constitutionally free to do so.

Finally, there is the possible objection that the curtailment of the territorial scope of the federal Act may make redundant the network of regional and district offices that has been established by the Department in the last few years. While some adjustment and relocation of personnel may eventually be necessary we do not anticipate any major upheavals. In the first place, the interprovincial component of trade practices complaints will always remain high and, to the extent that there is a fall off in numbers, it can and should be offset by a more in-depth investigation of trade practices at the national and regional levels. Secondly, if our recommendation with respect to the interdelegation of enforcement powers is adopted, the smaller provinces may well elect to delegate their enforcement powers to the existing federal facilities in preferences to establishing their own. Thirdly, if the federal government decides to retain the full scope of its criminal law powers there may be no fall off at all in the number of investigations -- in fact they could even increase.

(c) Exemption Provisions. A technique that offers considerable scope for flexibility and could meet some of the difficulties inherent in the adoption of a territorial formula consists in resort to the so-called exemption provisions. This technique is apparently well established in American federal legislative practice and is designed to encourage the states to adopt their own legislation in a given area (or to retain it if they already have it) and therefore obviate the

need for federal intervention. For example, section 111(a)(2) of the recently enacted Magnuson-Moss Consumer Product Warranty -- Federal Trade Commission Improvement Act* provides that

> (2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administer and enforces effectively any such greater requirement.

Assuming the exemption technique commends itself in the Canadian context, it could be used in one of two ways. If the new federal Act contains no general territorial restrictions an exception could be made involving intraprovincial practices with respect to those provinces that have comparable legislation of their own. Alternatively, as in the American precedents, a total exemption could be granted to the full extent of the provincial legislation.

Leaving aside possible constitutional problems, it seems to us there are objections to the exemption device which makes it an unattractive model for Canada. It would put the federal government in the delicate position of having to measure the equivalency or superiority of provincial legislation and the adequacy of its enforcement, not

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* pp. L 93-637 (1975)

only initially when the request for exemption is made but presumably on an ongoing basis. Given the already strained relations between the federal and provincial authorities in this area of consumer protection law, this form of paternalism would do nothing to improve them. It would no doubt be possible for the new Act to contain a more generous exemption formula -- one which would not require the federal authorities to measure the adequacy of the provincial legislation or the machinery for its enforcement. But too much slackness might expose the federal government to the complaint that it was abdicating its responsibilities. For all these reasons we would give low priority to the exemption device. We believe that in the trade practices area it would operate more successfully if applied informally on an administrative basis as the result of an understanding with individual provinces.

2. Types of Trade Practices

The thrust of the prohibitions in the consumer protection parts of the Combines Investigation Act is against "false or deceptive" representations or advertisements. It also represents the centre of gravity in the revised versions of the misleading advertising provisions in Bill C-2.* The trade practices legislation of British Columbia, Alberta and Ontario, on the other hand, encompasses unconscionable or unfair practices as well as those practices which are deemed to be false or deceptive.** It may therefore be suggested that a historical basis exists for maintaining this distinction in the new federal initiative and that by

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* 1st Sess., 30th Parl., 23-24 Eliz. II, 1974-75, as passed by the House of Commons, 16th Oct. 1975. Viz., sec. 36 et seq.

** S.B.C., 1974, c. 96, s. 3; S.A. 1975, c. 33, s. 4; S.O. 1974, c. 131, s. 2.

confining its focus to false or deceptive practices at least this element of overlapping would be avoided between the federal and provincial legislation. It could also be argued that unfair acts cannot be readily stigmatized as criminal and that the exclusion of this form of non-deceptive (albeit still objectionable form of) conduct from the new federal Act would conform to the traditional criminal law approach of earlier combines legislation.

In our view the attractiveness of this reasoning disappears on closer examination and we believe that the adoption of the suggested distinction for constitutional or jurisdictional purposes would unreasonably restrict the flexibility of the new federal Act while reducing only marginally the overlap between the federal and provincial acts. In the first place, it is no longer true to say that the Combines Investigation Act restricts itself to deceptive or false practices. The absolute prohibition in Bill C-2 on double-ticketing (section 36.2) and the qualified prohibitions of pyramid selling and referral selling (sections 36.3 and 36.4) are clearly directed towards the unfair aspects of these practices as well as any deceptive elements which may accompany them.

Non-deceptive unfair practices and practices which are reprehensible because they are deceptive frequently merge into one another and it would, in our opinion, be unwise as well as impractical to use the tenuous distinction between these types of practices as a basis for dividing jurisdiction between the federal and provincial authorities. We are fortified in this conclusion by the long established jurisdiction of the Federal Trade Commission over "unfair or deceptive acts or practices" in interstate commerce* and, to a lesser extent, by the more recently adopted provisions in the

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* 15 U.S.C. 45 (a) (1).

Australian Trade Practices Act 1974.* The Australian Act, like Bill C-2, also outlaws specified types of unfair practices.**

In opposing a jurisdictional allocation based on a rigid distinction between different types of unfair practices we are not necessarily suggesting that the new Act should copy FTC formula or foreclosing further consideration with respect to the best manner of implementing the reserved power. All we are saying is that the federal government should not preclude itself from being able to regulate unfair trade practices if on functional grounds it appears desirable fo it to do so.

3. Rule-Making Powers

From an administrative point of view it seems to us most desirable that the new Act should contain rule-making powers similar to those contained in such well-known federal consumer protection measures as the Comsumer Packaging and Labelling Act, the Food and Drugs Act, and Hazardous Products Act and similar to those contained in the British

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* Trade Practices Act 1974, No. 51 of 1974.

** Part V of the Act is devoted to consumer protection provisions. Division 1 is entitled Unfair Practices and covers misleading or deceptive conduct in general (sec. 52) as well as specific forms of deceptive practices. Ss. 57, 60, 61, 64 and 65 deal with a variety of unfair practices whose proscription is not based on proof of deception, viz., referral selling, coercion at place of residence, pyramid selling, and assertion of right to payment and liability of recipient for unsolicited goods. Division 2 voids the use of disclaimer clauses in contracts for the sale of goods.

Columbia and Ontario trade practices acts.* We see no jurisdictional dimension to the issue and we mention it only for the sake of completeness because it is included in Table 1.

4. Remedies

We adopt the same position with respect to any attempt to define jurisdictional boundaries in terms of the remedies afforded under the respective acts. Leaving aside any constitutional difficulties, in our view it would be as arbitrary to restrict the federal government to the exercise of public law remedies of the criminal law variety, or some of them, as it would be to attempt to distinguish between unfair and deceptive practices. We feel somewhat more strongly the argument that private law remedies more "naturally" fall into the provincial domain as part of the jurisdiction over property and civil rights.** Further reflection leads to believe however that this distinction could be as arbitrary as the others. It would surely be unsatisfactory if a court entertaining a prosecution under the federal act would be precluded from making an order of restitution as part of a prohibitory order or as part of a sentence

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* S.B.C. 1974, c. 96, s.2(1)(s), 3(2)(f) and 32; S.O. 1974, c. 131, s. 16(1).

** The Supreme Court's judgment in the Vapor case may lend credence to this sentiment, but in our opinion it is easily distinguishable. The Vapor case involved a subsection of the Trade Marks Act (sec. 7(e)) which conferred an independent private right of action not set in a regulatory framework nor ancillary to a genuine exercise of the criminal law power, and not confined to interprovincial or foreign acts or practices. The remedy provisions which we envisage would differ in all these essential respects.

following conviction, or if the federal Act were to be precluded from providing for the unenforcability of any agreement obtained by unfair or deceptive means. To argue in favour of this functional approach is not to argue in favour of the preclusion of provincial private law; it is merely to recognize the legitimacy of the federal provisions as properly incidental to the overall objectives of the Act.

5. Administration of Act and Delegation of Powers

Two separate questions arise under this heading. The first involves the type of enforcement agency that should be utilized for the purposes of the new Act, assuming the absence of any formal machinery to co-ordinate administration and enforcement of its provisions with the provincial legislation. The second and much more challenging question is how co-operation can best be secured between the two levels of government to ensure a reasonably uniform, effective and efficient administration of the new legislation.

Some of the constitutional issues affecting the first question have already been discussed and it is not necessary to retrace the same ground. Suffice it to say, that the contentious question is whether criminal law jurisdiction under the federal Act could be vested in the Federal Court of Canada or another federal tribunal or commission selected for the purpose. Whether as a matter of policy, jurisdiction should be conferred on the Federal Court of Canada, either mandatorily or at the option of the Crown, does not appear to us to stir great emotions. There is, however, an argument in favour of retaining the services of the provincial courts, at least on a concurrent basis. The provincial courts have been the venue for criminal prosectuions under the misleading advertising provisions of the Combines Investigation Act for

the past 15 years and they have acquired a considerable degree of familiarity with its provisions. There is no reason to believe therefore that any particular advantage is to be derived by conferring exclusive jurisdiction on the federal court. The advantages indeed may lie in the opposite direction assuming the existence of parallel provincial legislation and an effort by the provincial and federal authorities to co-ordinate their administrative and enforcement activities.

Their ability to agree on a co-operative program will be the touchstone of the success of the new policy. In the absence of such agreement, one or more of the following undesirable consequences could ensue:

(a) an offending party may potentially find himself exposed to successive or concurrent prosecution or varying forms of administrative action by the provincial and federal authorities;

(b) the enforcement measures may be conflicting in character, e.g. one level of government may launch criminal proceedings while another may be content with an assurance of voluntary compliance;

(c) If the federal and provincial acts, or the regulations adopted pursuant to the acts, differ in scope and definition the outcome of any proceedings may differ depending on which act is being invoked and where the proceedings are being brought;

(d) because of factual and legal uncertainties there may be doubt whether a practice is intra- or interprovincial in character, with the result that both levels of government may be reluctant to act; and

(e) an advertiser who seeks preclearance for a new type of advertisement or sales promotion may have to consult as many as 11 different agencies.

The potential difficulties which have been enumerated will be enhanced considerably if the federal and provincial acts also contain overlapping or conflicting private law remedies, although it is appreciated that the problem here is less to assure uniform administration than it is to secure uniform legislation.

In column 5 of Table 1 we have summarized a number of alternative solutions to the administrative problems and all of them involve some form of delegation either by one level of government to the other level or to a joint federal-provincial body specially created for the purpose. The concept of an inter-delegation of powers - whether to achieve greater uniformity of administration, to bridge a constitutional hiatus, or to make use of superior facilities possessed by the other level of government - is of course not new. It has existed in some form in Canada for many years although it has been fully explored only since the conclusion of World War II as another manifestation of the spirit of co-operative federalism. To cite some well-known examples,* the Western provinces have for many years made use of the inspectorial facilities

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* A comprehensive collection is found in Privy Council Office, Federal-Provincial Relations Division, Descriptive Inventory of Federal-Provincial Programs and Activities as of September 30, 1973 (Ottawa, January 1974).

of Agriculture Canada* and eight provinces and 160 municipalities have contracted for the police services of the RCMP.** In the converse direction, under such diverse acts as the Motor Vehicle Transport Act,*** the Agricultural Products Marketing Act,**** the Farm Products Marketing Agencies Act,***** the Energy Supplies Emergency Act,****** and Part IV of the Canada Labour Code,******* Parliament has authorized the delegation to provincial authorities of a wide range of administrative functions varying from complete administration of a licensing function or marketing scheme (as under the Motor Vehicle Transport Act and the Agricultural Products Marketing Act) to investigative and inspectorial functions (as under

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* J.A. Corry, "Difficulties of Divided Jurisdiction", Appendix 7, Report of the Royal Commission on Dominion-Provincial Relations (Ottawa, 1939), pp. 11 et seq.

** Descriptive Inventory, op. cit., at p. 336.

*** R.S.C. 1970, c. M-14.

**** R.S.C. 1970, c. A-7.

***** 19-20-21 Eliz. II, S.C. 1970-71-72, c. 65, sec. 23.

****** 21-22-23 Eliz. II, S.C. 1973-74, c. 52, sec. 9(2).

******* R.S.C. 1970, c. L-1.

Part IV of the Canada Labour Code). The constitutional validity of such delegating mechanisms is now well established.*

Which of these models is more apt in the present context, what are the prospects for the adoption of any one, and what would be some of the shortcomings? It seems to us unlikely that the federal government would be willing to delegate any of its powers to a province given the existence of its own well established facilities under the Combines Investigation Act, the pivotal position of the Director of Investigation and Research, and the existing assumption in the Act (which is likely to be carried forward into any new Trade Practices Act) that ultimate control over any public prosecution vests in the Attorney-General of Canada.** It is conceivable that the federal government may be willing to reach informal agreement with respect to local forms of misleading advertising and that it will be happy to leave these for redress by provincial authorities acting pursuant to a provincial Trade Practices Act, and we discuss this possibility in a later section. Such an arrangement will

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* P.E.I. Marketing Board v. H.B. Willis Inc. (1952) 2 S.C.R. 392; Coughlin v. Ontario Highway Transport Board (1968) S.C.R. 569.

** Sec. 15(2). The history of sec. 15(2) and the constitutional problems are discussed by Bruce McDonald in "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969) 47 Can. Bar Rev. 161, at pp. 212 et seq. Sec. 15(2) is not couched in mandatory terms and it is not clear that the Attorney-General of Canada is given exclusive public prosecutorial powers. A province would of course be free, like any citizen, to launch a private prosecution but that is another matter.

not involve a delegation of powers and therefore falls outside the purview of the present discussion.

It appears to us to be equally unlikely that a province with enforcement machinery of its own would be willing to delegate its enforcement powers to the federal government. This may be especially true given the close relationship between trade practices legislation and other consumer protection measures adopted by the provinces. The prospects may be better in the case of one of the smaller provinces which has not yet adopted trade practices legislation of its own but is anxious to secure the political benefits of such legislation without incurring its administrative costs. Whether the federal government would be willing to accept a delegation of powers under such circumstances and what conditions it should attach to its acceptance, we are not competent to judge. The proposed terms of delegation, the scope of the delegation, and the degree of similarity between the federal and provincial Acts would no doubt be important considerations.* It seems to us in any event that the importance of these delegated powers is likely to be small in the total Canadian picture and we do not therefore pursue the theme. At the same time we should make it clear that we can see no objections to this form of interdelegation.

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* An interesting analogy exists in the agricultural field. Apparently the federal Department of Agriculture will provide free meat inspection services for any province whose meat inspection standard conforms to the federal standard while a non-conforming province would be required to pay for the service. Descriptive Inventory, op. cit., pp. 14-15. We doubt however whether a similar solution would be adequate in the trade practices area since the administration of a trade practices act raises much more complex issues.

A more promising avenue of approach might appear to be the concept of a joint federal-provincial Trade Practices Commission similar to the CANSEC proposal advanced in 1967 by the Ontario Securities Commission* for the purpose of securing uniformity of administration of the provincial securities acts. The authors of the proposals felt the need for such an organization in order to overcome the following difficulties:

> "(a) to get over jurisdictional problems in conducting investigations,
>
> (b) to provide unified prospectus clearing and a common filing point for the increasing masses of material required of persons and companies subject to the Act, and
>
> (c) to eliminate unequal standards of administration in different provinces."

The commission envisaged in the proposals would be a three-tiered body comprising a Council of Ministers at the apex, a number of full time and part time commissioners (located in various parts of Canada) in the middle and, at the bottom, an administrative staff headed by a director and associate director. The Council of Ministers would include a Minister from every co-operating jurisdiction and voting would be weighted in accordance with an agreed formula. The Council would fix the operating budget, appoint the senior staff (including the commissioners) and discuss questions of policy and legislative change. The functions of the commissioners would be to hear appeals from

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* O.S.C. Monthly Bulletin, Nov. 1967, p. 61. See further, Banwell, "Proposals for a National Securities Commission" (1968-70) 1 Queen's Intramural L.J. 3, and Howard, op. cit., pp. 90 et seq.

decisions made at lower levels and to exercise original jurisdiction in designated areas. The chairman of the commission would also serve as chief executive officer of the commission and problems of day to day administration would be ultimately resolved by him. The authors of CANSEC did not envisage nor did they stipulate the existence of a uniform securities act; they merely predicated a compatible scheme of administration. Indeed, it was clearly conceded that each member province would be free to change its substantive securities rules at will.

CANSEC has been hailed as a bold and imaginative concept,* but even those who support it in principle have found it seriously deficient in detail. The following are some of the more serious weaknesses in the Ontario proposals. First, because of the right of each member participant to retain its own substantive provisions the issuer of a security would still be obliged to comply with eleven varying sets of laws and be exposed presumably to differing forms of sanctions, private as well as public. Secondly, the federal role in the new scheme was not clearly defined and in particular it was not clear to what extent substantive jurisdiction was being conceded to the federal government to regulate interprovincial and foreign transactions. Thirdly, the collective decision-making powers of the Council of Ministers would be difficult to reconcile with the traditional rule of parliamentary government that a Minister is responsible to his own legislature for the administration of his Act.

Not all of these difficulties would be replicated if an attempt were made to adapt the CANSEC concept to the trade practices field. Trade practices regulation does not raise the same issues as

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* Howard, op. cit., p. 102.

securities regulation. We would ourselves regard the first difficulty as probably the most formidable.* But even assuming all the shortcomings could be resolved, it seems to us unlikely that an integrated federal-provincial trade practices commission would be seriously considered for adoption in the forseeable future. The main difficulty is that the idea is premature. In our opinion, its realization would only be feasible if the federal government and a substantial number of the provinces were convinced of the intractable nature of the problems that arise under a system of multiple jurisdictions and the urgency of establishing an integrated form of administration. At a time when only three of the provinces have adopted trade practices legislation and only one has acquired substantial experience in its administration, it would be fanciful to suggest that the new Jerusalem is even remotely in sight. It could however be considered as part of a long-range objective.

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* Consider the following potential difficulties. (a) A complaint is received concerning a particular practice which originates in Province X but also affects citizens in Province Y. The Trade Practices Act in X does not cover the practice but that of Province Y does. Which law should the Commission apply? Would it make a difference if X had intentionally excluded the practice as a matter of policy? What would be the position if neither X nor Y proscribed the practice but the federal Act did?

(b) The substantive provisions in the laws of X and Y are the same but the law of Y contains superior remedial provisions. In both instances, on what basis would the Commission invoke one law in favour of another and could the issue not provoke serious intramural conflicts?

6. Consultative and Other Forms of Co-operative Federal-Provincial Machinery

Our pessimism concerning the feasibility of an integrated structure at this early phase does not however lead to the conclusion that less ambitious forms of co-operation may not be practicable. Among the possible alternatives we would suggest the following:

(i) establishment of an Association of Trade Practice Administrators;

(ii) regular regional and national consultations between federal trade practices officials and their counterparts in each province;

(iii) co-operative schemes for the training of investigative staff;

(iv) sharing of computer, scientific and other costly facilities, either on a reciprocal or on a cost-sharing basis;

(v) joint office facilities, particularly for the purpose of receiving complaints and answering enquiries from the public.

There are numerous precedents in other areas of federal and provincial relations for each of these recommendations and their adoption, though falling short of complete integration, would go a substantial way to reducing friction and promoting greater efficiency in the administration of the federal and provincial acts. We proceed now to discuss some of the salient features of the recommendations, their rationales, and what their implementation would be designed to accomplish.

(i) Association of Trade Practice Administrators.

The functions of the Association would be comparable to those presently exercised by the Association of Superintendents of Insurance or the Canadian Provincial Securities Administrators. They would embrace the exchange of information, investigation of common problems, and the drafting of uniform legislation including particularly the drafting of uniform regulations and trade practice rules and the adoption of "national policy statements". The Association could also serve an important role in resolving jurisdictional issues and helping to establish criteria with respect to the types of trade practices that should be handled by each level of government. It will be seen therefore that the Association will have more sharply defined functions than those presently exercised by the intermittent conferences of federal and provincial consumer protection officials. It would also confer on the officials a more regularized status in their collective capacity than the status they enjoy at the moment.

(ii) Regular Consultations with Individual Provinces

As our Report has earlier shown, such consultations are a common occurrence now but their effectiveness varies widely from province to province and region to region. In some regions there appears to be very little communication on a regular basis and in others communication appears to involve perfunctory meetings and the occasional referral of complaints which the referring agency feels it is not jurisdictionally competent to handle. Our objective would be to enlarge the scope of these consultations in at least three ways: first, in putting them on a regularized

footing where the nature of the region and the number of complaints justify regular meetings between the relevant officials; secondly, by encouraging the regular exchange of statistics so that each level of government would know the number and types of complaint the other was receiving; and thirdly, by authorizing federal officials to discuss pending investigations with their provincial counterparts and, in appropriate circumstances, reach agreement on the allocation of jurisdictional boundaries. The last objective may require an amendment to the Combines Investigation Act (or the adoption of a more flexible confidentiality provision in the new Trade Practices Act), but in our view, and that of the provincial authorities and the federal field officials interviewed, this step is overdue in any event.* It may also require some adjustment in the internal procedures of the Misleading Advertising Division of the Department, but this change too can readily be justified in terms of more harmonious relations with the provincial officials. Needless to say, all these objectives should be pursued on a reciprocal basis.

(iii) Training of Staff.

It is generally conceded that the investigation of deceptive or unfair trade practices calls for special skills. To the extent that the federal government has acquired greater expertise in this area than the provinces, we think it should be

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* In the past the Department has taken the inflexible position that the Combines Act enjoins strict secrecy on the Director and his staff. Whether this represents a correct reading of the Act is open to question. In any event, a provision such as sec. 12 of the B.C. Trade Practices Act provides a better model for reconciling the needs of fairness in investigation with the public interest in effective administration of the Act.

willing to share it with the provinces in much the same way as the RCMP is willing to provide training for provincial police officers.

(iv) Statistical Co-operation.

The common sense nature of this recommendation is so obvious that it borders on the trite. Yet co-operation at this level is still strikingly absent between the two levels of government. There is no common language of statistics, for example; the statistics are often incomplete; and each level of government usually produces statistics without any attempt to co-ordinate its efforts with those of the other jurisdictions.

(v) Joint Office Facilities

It has long been a complaint of consumers that they are frequently caught in the meshes of inter-jurisdictional niceties -- both between departments of the same government and between departments belonging to different levels of government -- while trying to obtain an answer to a problem. It is particularly difficult for them to understand why separate federal and provincial offices are necessary in the same city to handle consumer complaints or enquiries. We appreciate that there may be administrative problems in establishing joint offices (particularly in a city where the complaints division may be only part of a larger office structure) but these problems have been surmounted in other areas of concurrent jurisdiction and we should not have thought them insurmountable in the consumer protection area. The Department has funded "store-front offices" staffed by non-civil servants to provide information and assistance to consumers without regard to jurisdictional boundaries and LIP grants in various cities have accomplished much the same purpose. We would welcome a pilot project to test the feasibility of the concept when it directly involves the joint participation of federal and provincial officials.

C. Federal-Provincial Co-operation in the Wider Consumer Protection Context

Federal-provincial relations in the trade practices area cannot be isolated from the wider problem of placing federal-provincial relations generally in the consumer protection field on a healthy footing. In the light of our earlier observations it would be misleading to suggest that such an environment already exists.

The early signs in the 1960's were auspicious. Federal and provincial consumer protection legislation has long roots and can be traced to the early days of confederation. However, like consumerism itself, this branch of government activity has only acquired a clear personality of its own in the past decade with the establishment of the federal Department of Consumer and Corporate Affairs and its provincial counterparts and the enactment of much new consumer protection legislation at both the federal and provincial levels.*

In this most recent phase the need for federal-provincial co-operation was quickly recognized.** The federal government convened what appears to have been the first federal-provincial meeting specificially devoted to consumer protection problems in December 1966. The subject on that occasion was the dovetailing of the emerging federal and provincial legislation in the consumer

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* See generally Ziegel, "The Future of Canadian Consumerism" (1973) 51 Can. Bar Rev. 191.

** We have borrowed generously in the next two pages from the account in Louis Romero's research paper for the Canadian Consumer Research Council on Federal-Provincial Relations in the Field of Consumer Protection (October 1975, unpublished), pp. 60 et seq.

credit area. This meeting was followed by another conference held in April of the following year when the main topic was again consumer credit. Since then the federal government has convened other conferences at irregular intervals to discuss such specific topics as the consumer aspects of the new Bankruptcy Bill,* home warranties, and, most recently, the prospective borrowers protection act. Some of these meetings have been held on a regional rather than national basis.

Ontario took the initiative in convening an inter-provincial meeting of officials in 1968, which also was primarily devoted to a single topic (consumer credit). By 1970 a consensus had developed among provincial officials and their Ministers that it would be useful to hold inter-provincial meetings at regular intervals. Since then the deputy ministers and other senior administratives have usually met at least once a year. The provincial Ministers appear to have established a less regular pattern of meetings and have not managed to adhere to a yearly format. Federal officials have been invited to participate at many of the inter-provincial meetings, but the evidence of strained relations has also manifested itself in this area. The federal government was not invited to attend the meeting of provincial Ministers held in 1974 and it only attended some of the sessions at the meeting of senior provincial officials, held in Saskatoon in September 1975. Apart from these formal gatherings federal and provincial officials are regularly in touch with each other by telephone and letter and through individualized visits.

The precise impact of this interplay of meetings and conferences and the effectiveness of the existing machinery still awaits detailed study, but a few tentative conclusions may be hazarded:

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* Bill C-60. The Bill has now been withdrawn for revision.

1. In terms of substantive results the earlier meetings appear to have been more productive than the later ones. The complementary treatment, for example, of consumer notes and cut-off clauses by the federal and provincial authorities* can be traced to this period as well as the adoption by the provinces of substantially uniform disclosure requirements in consumer credit agreements.

2. Neither uniformity, however, nor co-ordination of federal and provincial legislation appears to have been pursued with the same zeal in the most recent period. The Trade Practices Acts of British Columbia, Alberta and Ontario differ from each other in important respects in substance and enforcement machinery and, to a lesser extent, this is also true of the consumer reporting legislation. Quebec's Consumer Protection Act is largely sui generis although its underlying concepts have close parallels with the consumer protection acts in the common law jurisdictions. On the whole, it would be fair to say that the provinces have not developed any strong intellectual or political commitment to the principle of uniform legislation and that local perceptions, local interests and local pressures play a more important role in determining the kind of legislation that is adopted and the intensity of its enforcement.**

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* See Ziegel, "Comment" (1971) 49 Can. Bar Rev. 121 ibid, (1973) 51 Can. Bar Rev.

** See further Ziegel, "Canadian Consumerism in the 70's: The Challenge of Interprovincial and Federal-Provincial Relations" (unpublished paper presented at the Inter-provincial Conference of Consumer Protection officials, Jasper, May 16, 1974).

3. The inter-provincial conferences are loosely structured. They have no institutionalized format, and no staff or research facilities of their own. Though this does not preclude effective co-ordination of effort between the provinces it does not promote it either.

4. The machinery of consultation between the federal and provincial governments is probably even less calculated to ensure effective co-operation between these two levels of government. Federally initiated conferences appear in the past to have been convened on an ad hoc basis and, like the interprovincial conferences, the federal-provincial conferences appear to lack any institutionalized form or permanent character. This may explain in part why so many provincial officials see the federal-provincial conference primarily as a vehicle for promoting federal interests and why there are widespread provincial complaints about inadequate consultation with respect to the principle, the desirability, and the need for new federal legislation.

It would be presumptuous for us to suggest changes in the machinery of interprovincial consultation -- this falls outside our terms of reference. And equally it would be misleading to suggest that changes in the federal-provincial machinery of consultation would by themselves eliminate differences based on political philosophies or reconcile conflicting views with respect to the proper scope of federal and provincial activity in the consumer protection area. We believe however that the atmosphere in which the discussions take place could be improved and for this purpose we recommend the establishment of a federal-provincial secretariat on consumer affairs. The secretariat would have four principal functions: first, to act as a clearing house and liaison office for communications and the dissemination of information between the federal government and the provinces; secondly to prepare the

agenda and provide background materials for federal-provincial conferences; thirdly, to investigate common problems, recommend appropriate solutions and, if so requested, prepare model legislation.

Assuming the secretariat functions successfully it could be expected to achieve some of the following goals. It would provide more permanent machinery for federal-provincial relations and give good earnest of the federal government's desire for harmonious relations. It would create a more detached environment for the discussion of common issues, particularly if the secretariat is seen to act more as honest broker than as a simple handmaiden of the Department. And finally, it might lead to the establishment of an inter-provincial secretariat with similar objects and functions.*

Apart from the secretariat the federal government might also consider appointing a Co-ordinator of Federal-Provincial Consumer Relations, whose functions would be similar to the Office for Federal-State Co-operation occupied by Mr. Gale P. Gotschall in the Federal Trade Commission.** The Co-ordinator might also serve as chief executive of the secretariat. He would provide a two-way channel of communication, first, in responding to questions concerning federal programs and their administration and, secondly, in familiarizing himself with provincial programs and explaining them to other federal officials. It is important

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* As to the desirability for which see Ziegel, ibid.

** The office was established in 1965. Its functions are described in Paul Rand Dixon, Federal-State Co-operation to Combat Unfair Trade Practices 39 State Government 37 (1966).

therefore that he should be able to win the confidence of both levels of government and, like the secretariat itself, be seen as a detached intermediary and not as a protagonist for any particular cause other than the one for which he is appointed.

APPENDIX TO CHAPTER IV

NOTE ON THE AMERICAN POSITION

In organization, allocation of powers, and judicial construction the American constitution differs markedly from the Canadian constitution. The practical results however are not always that different from those encountered in the Canadian context and, in the trade practices area, the Americans have long been exposed to the kinds of problems that are now beginning to emerge in Canada. We can therefore draw sustenance from the American experience and benefit from it in shaping our own trade practices legislation and adjusting it to the exigencies of federal-provincial relations.

1. The Constitutional Position

The American constitution does not confer on the federal government a general criminal law power comparable to the power enjoyed by the Canadian government under sec. 91(27) of the BNA Act. Article I, section 8 of the American constitution does however vest broad power in the Congress "to regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes". It is this power which has sanctioned massive legislative intervention by the Congress over the years in the operations of the marketplace and is apparently the basis of most of the post-war consumer protection legislation adopted by this body. It also constitutes the legal basis of the Federal Trade Commission Act.

On its face the federal power appears more restrictive than the trade and commerce power conferred on the Canadian government under sec. 91(2) of the BNA Act. Article I, section 8 basically contemplates interstate and foreign commerce whereas the literal language of sec. 91(2) is not so

confined. In practices as is well known, the positions are reversed. In the benevolent hands of the U.S. Supreme Court the federal commerce power has blossomed forth and become the constitutional mainstay of federal regulatory and prohibitory powers in the eeconomic area while the BNA power has been severely constrained by a long course of adverse judicial construction.

This is not the place to trace the evolution of the commerce power as construed by the American courts.* Suffice it to say, its most distinctive feature, and the feature that distinguishes it radically from its Canadian counterpart, is enshrined in the so-called Shreveport doctrine.** The doctrine empowers the Congress to regulate any aspect of intrastate activity so long as it can be shown to affect substantially interstate commerce and the regulation thereof;*** and commerce itself has been given the broadest possible meaning.**** Not surprisingly, the Shreveport doctrine has been hailed as perhaps the "most outstanding single achievement of the Supreme Court in the field of constitutional law".*****

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* For an excellent Canadian treatment, see Alexander Smith, The Commerce Power in Canada and the United States (Toronto, 1963), Book 2.

** So named after the Shreveport Rate Cases (1914) 234 U.S. 342. The doctrine is examined in detail in Smith, ibid., ch. 12.

*** Ibid., pp. 373-4, 472.

**** Ibid., pp. 262-3.

***** Ibid., p. 470.

As a result, Congress is not subject to the kinds of constraint that face the Canadian government in the framing of trade practices legislation - in fact it is not inhibited by any serious restrictions. We shall see in a moment how the constitutional permissiveness has influenced the evolution of the powers of the Federal Trade Commission itself.

From the Canadian viewpoint the interesting (and to some extent still unsettled) question is to what extent the states are deemed to enjoy concurrent commerce powers with the federal government. Obviously they can regulate purely intrastate activity but do they also possess jurisdiction to regulate the interstate aspects of the local economy? And if there is a conflict between Congressional and state legislation which prevails? The American constitution does not expressly vest exclusive interstate commerce power in the Congress, but it does contain the supremacy clause* which governs the resolution of the conflicting exercise of legislative authority by the two levels of government.

Judicial construction of state powers has been exposed to cyclical swings. Chief Justice Marshall, in the landmark case of Gibbons v. Ogden,** was of the view that Congress had exclusive jurisdiction to regulate interstate commerce. He conceded however an incidental state power provided it could be justified as an exercise of the state police power. A full concurrency power, on the other hand, subject only to the supremacy doctrine, was asserted by Chief Justice Taney in

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* Article VI, clause 2.

** (1824) 9 Wheat. 1.

the Licence Cases.* Still a third Supreme Court decision, Cooley v. Board of Wardens** adopted a compromise position. According to the majority holding in that case, subjects of national or primary importance fall within the exclusive province of the federal government, but subjects of lesser importance remain within the concurrent jurisdiction of the states. Cooley apparently still represents the prevailing judicial doctrine,*** although, as Professor Smith informs us, "the approach now (in determining the validity of a state law) is pragmatic, the criteria objective".****

All three decisions made it clear that in the case of conflict the Congressional will must prevail. As will be seen, at least in the trade practices area, the American courts, like the Canadian courts of late, are not overzealous to find a conflict: mere duplication or parallel legislation does not offend. Accommodation wherever possible, not repugnancy, is the prevailing leitmotif, both judicially and administratively. But an important difference between the U.S. and Canadian approaches resides in the Congressional role played in the exercise, and even allocation, of concurrent powers. Settled American doctrine has it that even Congressional silence can be interpreted as a negative occupation of a particular area.***** From this it follows logically that an express

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* (1847) 5 How. 504.

** (1852) 12 How. 299.

*** Smith, op. cit., pp. 230-31.

**** Ibid., p. 229.

*****Ibid., pp. 224-26.

Congressional statement will preclude state intervention, although it has recently been said that such an intention will not readily be inferred unless it is manifest.* All this has no counterpart in Canadian constitutional doctrine. Even more striking is the now accepted constitutional solecism** that Congress may permit state regulation of matters clearly of a national or primary character. It is easy to see why Professor Smith describes Congress as "presiding" over the commerce power.***

2. Federal Regulation of Trade Practices in the Consumer Area

The main focus of federal efforts has long resided in section 5(a) of the Federal Trade Commission Act.**** The Federal Trade Commission was established in 1914 and section 5(a) of the original Act declared unlawful "unfair methods of competition in commerce". Thus, as the Supreme Court pointed out in FTC v. Raladam Co.***** (1931), the primary objective of the Act was not the protection of consumers but the elimination of unfair competitive practices.

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* Double-Eagle Lubricants Inc. v. State of Texas (1965) 248 F. Supp. 515, 7 FTC Stat. and Court Decisions 1416 at 1420, citing Florida Lime and Avocado Growers Inc. v. Paul (1963) 373 U.S. 132.

** Smith, op. cit., pp. 232-3.

*** Ibid., p. 233.

**** 15 U.S.C. 45(a).

*****(1931) 283 U.S. 643.

The original Act suffered from other shortcomings. One was that its scope was restricted to unfair methods of competition "in commerce", commerce being defined in section 4, in the language of the Constitution, as "Commerce among the Several States or with foreign nations...". In other words, the Commission was denied the benefits of the Shreveport doctrine. A second difficulty was the limited sanctions entrusted to the FTC for the purposes of enforcing its mandate. The FTC was only empowered, after due hearing, to issue a cease and desist order.* The Commission possessed no punitive powers under section 5(a) and, it would seem, no remedial power to order redress or other forms of relief for victimized consumers.** Thirdly, there was serious doubt*** whether the Commission could exercise a substantive rulemaking power - obviously a question of key importance if the open-ended language of section 5 was to be reduced to specific norms of conduct in the myriad in the countless situations in which it could apply.

In the intervening years Congress has applied itself, more or less diligently, to redress these shortcomings. The Wheeler-Lea Act of 1938 amended section 5 and expanded the Commission's jurisdiction to encompass "unfair or deceptive acts or practices" in commerce as well as "unfair methods of comptition". A still more important group of amendments was introduced in the recently adopted Magnuson-Moss -- Federal Trade Commission Improvement Act,**** to wit:

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* 15 U.S.C. 45(b).

** Heater v. FTC (1974) 503 F. 2d 321.

*** National Petroleum Refiners Association v. FTC (1973) 482 F. 2d 672 (D.C. Circ. C.A.).

**** P.L. 93-637 (1975).

1. Section 5 of the Federal Trade Commission Act was amended by striking out "in commerce" and substituting the immensely more generous language "in or affecting commerce" (sec. 201(a)).

2. Section 202 confers express rule-making powers, both interpretive and substantive. (Note in particular that the substantive rule-making powers include the adoption of requirements "for the purpose of preventing" unfair acts or practices.)

3. The Commission may seek to recover civil penalties for knowing violations of any rule respecting unfair or deceptive acts or practices and for knowing violations following the issuance of a cease and desist order (sec. 205).

4. A new section 19 is added to the FTC Act empowering the Federal Trade Commission to commence civil actions against persons violating a rule or a cease and desist order for such relief as the court finds necessary to redress injury to consumers.

3. The Meaning of "in Commerce" Under Section 5

As has been noted, prior to its recent amendment the FTC's jurisdiction was restricted to acts or practices "in" interstate and foreign commerce. In view of this restriction and its close analogue to one of the meanings which has traditionally been ascribed to the Canadian trade and commerce clause, it may be interesting to illustrate how the FTC and the American courts have construed the phrase in practice.

Section 5 has been held to apply in the following circumstances:

- An advertising agency preparing commercials for showing over national TV network:

  Colgate-Palmolive Co. v. FTC (1962) 310 F. 2d 89.

- An advertisement in a newspaper which has distribution in three states:

  Guziak v. FTC (1966) 361 F. 2d 700.

- It is semble sufficient to show interstate solicitation whether or not actual interstate sales took place:

  FTC Dkt 8695; CCH Trade Reg. Rep., para. 830.032.

- A contract contemplating interstate shipment is sufficient even if the contracting parties are within the state:

  FTC v. Pacific States Paper Trade Assoc. (1927) 273 U.S. 52.

- Correspondence courses delivered and distributed through interstate mails:

  FTC v. Civil Service Training Bureau Inc. (1935) 79 F. 2d 113.

- Intrastate activity which constitutes an integral and indispensable part of interstate trade:

  Asheville Tobacco Board of Trade Inc. v. FTC (1959) 263 F. 2d 502.

- Local finance company, wholly owned by auto manufacturer, and acting as agent in a unified plan of selling and financing cars shipped in interstate commerce:

  GMC v. FTC (1940) 114 F. 2d 33.

- Retail credit sales which are an adjunct to interstate commerce:

  Ford Motor Corp. v. FTC (1941) 120 F. 2d 175.

- The FTC Act does not require substantial sales in interstate commerce before the FTC can proceed:

  Surf Sales Co. v. FTC (1958) 259 F. 2d 744;
  Safeway Stores Inc. v. FTC (1966) 366 F. 2d 795.

- Warehousing of defendant's units prior to sale within individual states by the defendant's own salesmen:

  Holland Furnace Co. v. FTC (1959) 269 F. 2d 203 and 295 F. 2d 302.

4. State Regulation of Unfair and Deceptive Trade Practices

This Note has earlier explained the constitutional basis of state regulation of consumer trade practices. To recapitulate, it arises out of the concurrent powers enjoyed by the states in the "lower reaches" of commerce as a result of the Cooley doctrine and may co-exist with similar federal legislation in the absence of direct conflict or a Congressional intent to preempt the field. The reader will not fail to note the striking resemblance between this result and the

recent decisions in Canada upholding the exercise of provincial powers under the aspect doctrine.

It remains to note how the states have exercised their power. Forty eight states have now adopted some form of trade practices legislation* but all of the Acts (if one ignores the earlier largely ineffectual "Printer's Ink" statutes) are much later in date than the FTC Act.** They have also all been influenced, to a greater or lesser degree, by the concepts and techniques of the FTC Act. Indeed, the FTC has played an active role in promoting the adoption of state trade practices legislation.

The state Acts fall into two principal categories.*** The first category comprises the "Little FTC" Acts which trace their lineage to the federal parent statute. In 1967 the Committee of State Officials on Suggested State Legislation of the Council of State Governments recommended for adoption a Model Unfair Trade Practices and Consumer Protection Law which was initially developed by the FTC. The Act was subsequently amended in 1967 and 1970. The Act offers three alternative forms for section 2, which defines unlawful

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* FTC Fact Sheet, State Legislation to Combat Unfair Trade Practices (Revised June 1974), and updating supplied by Mr. Gale P. Gotschall as of October 10, 1975.

** Most of them appear to have been adopted in the late 1960's or early 1970's. See further Nat. Assoc. Attorneys General, Committee on the Office of Att. Gen., State Programs for Consumer Protection, (1973) pp. 34 et seq., and Lovett, State Deceptive Trade Practices Legislation (1972) 46 Tul. L. Rev. 724.

***COAG, ibid., p. 34.

practices. The other principal type of Act is known as the Uniform Consumer Sales Practices Act and was drafted by the National Conference of Commissioners on Uniform State Laws. Only two states (Ohio and Utah) have so far adopted this Act.

Jurisdiction under the former type of Act is usually vested in the state attorney general.* Whoever the enforcement officer, the degree of enforcement appears to vary considerably from state to state depending on the resources available** and, it is fair to assume, the general political climate.

5. Federal-State Relationships in the Trade Practices Area

The overall impression gained by the foreign observer is that a healthy and co-operative relationship exists between the federal and state governments and that both the federal agencies and courts have been anxious not to discourage the states from playing an active role in this area. This goal has been pursued even at the expense of a lack of national uniformity and sometimes at considerable inconvenience to the business community.

The following factors support this conclusion. In the first place, neither Congress nor the FTC (through its Trade Regulation Rules) has sought to pre-empt the trade practices field although it is clear they have the constitutional power to do so. The Congressional reluctance is exemplified through the use of exemption provisions in favour of state concurrency to which reference has been made

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* Ibid., p. 36.

** Ibid., Table 3, p. 11.

earlier. A striking example of the FTC's restrained hand is afforded in the area of door to door sales regulation by the Commission's response to urgent industry requests for a pre-emptive FTC rule once it became clear that the Commission intended to adopt a federal regulation. Industry representatives argued that it would be very burdensome for interstate sellers to have to reconcile the widely varying state provisions on the subject with the proposed federal rule and to comply both with the state provisions and the federal rule. The Commission declined to accede to the requests and reasoned as follows:*

> In the past the Commission has recommended and encouraged the enactment of State and local laws, patterned after the Federal Trade Commission Act, in order to enlist the resources of the States in the constant battle to protect the consumer from unfair and deceptive trade practices. This policy was premised on the hope that the States would have the weapons they needed to combat business practices which were beyond the reach of Commission jurisdiction, and perhaps to exercise greater powers with respect to businesses which might be subject to the jurisdiction of both the Commission and the States. However, apparent inconsistency between State and Federal regulation does not always result in the former being struck down. Thus in Swift & Co. v. Wickham, 364 F. 2d 241 (2d Cir. 1966),

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* FTC, Cooling-Off Period for Door-to-Door Sales, Trade Regulations Rule and Statement of Basis and Purpose, 37 Fed. Reg. 22934 at 22958.

> the court held that a Federal poultry labeling regulation did not pre-empt a more detailed and stringent New York State regulation prescribing the manner in which poultry products in that State should be weighed, measured, and labeled.
>
> It would seem that the Commission should not abandon its policy of co-operative and complimentary actions (sic) in absence of cogent and compelling reasons for doing so. If the State cooling-off laws give the consumer greater benefit and protection in regard to notice, time for election of the cancellation remedy, or in transactions exempted from this rule, there seems to be no reason to deprive the affected consumers of these additional benefits. On the other hand in those States which do not have cooling-off laws, or which have laws which do not accord the consumer protection and benefits provided in this rule, the rule would supply the needed protection or be construed to supersede the weak statute to the extent necessary to give the consumer the desired protection.

Although the factor is not mentioned in the Commission's reasons, it is fair to assume that the slender resources of the FTC and its inability to police adequately activity in 50 States strongly influences its encouragement of state participation. The relevance of this attitude in the Canadian context hardly needs to be emphasized.

The accommodating judicial attitude is illustrated by the U.S. District Court decision in Double-Eagle Lubricants, Inc. v. The State of Texas

(1965) 248 F. Supp. 515.* Both the FTC and the State of Texas had adopted a substantially similar regulation concerning the labelling of reconditioned motor oil offered for sale to the public. The plaintiffs argued that the FTC regulation had pre-empted the field and they sought a declaratory judgment and injunction against the enforcement of the Texas provisions. The Court rejected the action and held, first, that there was no Congressional intent to confer exclusive jurisdiction on the FTC and, secondly, that there was no conflict between the State and FTC requirements. In reaching this conclusion the Court also relied on an earlier decision of the U.S. Court of Appeals for the Fourth Circuit, Royal Oil Corp. v. FTC (1959) 26 F. 2d 741 which had reached the same conclusion on similar facts.

In the instant case the Court also had no difficulty in finding that the Texas provisions were a legitimate exercise of the State's policy power "to protect the safety and property of the public and to prevent a deception as to the nature and quality of the product". The Court continued:**

> While the law incidentally affects interstate commerce, it does not discriminate against such commerce and is reasonable in its requirements.

It does not stretch the imagination to envisage an almost identical Canadian judgment under similar circumstances.

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* Also reported in (1965) 7 FTC Stat. and Court Decision 1416.

** Ibid., at p. 1422.

Finally, there are the extra-legal efforts made by the FTC to pursue co-operative relationships with the states. We have already referred to the Office for Federal-State Co-operation established by the FTC in 1965 and its initiative in preparing a Model Unfair Trade Practices and Consumer Protection Law for adoption by the states. The states' perception of the federal role and the harmonious relationship between the two levels of government is adequately conveyed in the following passage which appears in a recent state-sponsored publication:*

> The FTC is perhaps the most active federal agency. With its broad authority to stop unfair methods of competition and unfair or deceptive acts or practices, it has provided guidance for state enforcement officials. Its fifty years of experience, and expertise in investigation and litigation have been of great assistance to the states. The Commission has assisted the newcomers to the field of consumer protection in developing educational programs, preparing legislation and structuring programs.
>
> The FTC established an office of Federal-State Co-operation in 1965. It has worked to encourage states to adopt "little F.T.C." acts and to foster interjurisdictional co-operation. Assistance in drafting proposed legislation, providing research and training assistance and access to records of commission proceedings together with continual advice regarding the activities of consumer protection agencies, both state and federal,

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* COAG, op. cit., p. 46.

> throughout the nation, descriptions of various fraudulent and deceptive schemes presently occurring around the nation and the distribution of copies of pleadings in important state consumer cases are activities of the Federal Trade Commission that have proven more than helpful to the states in the administration of their programs.

It does not appear that either the state or federal authorities have found it particularly difficult, much less impossible, to run their trade practice programs on a concurrent basis and up to the present time it has not proven necessary to establish any inter-delegation of powers in the trade practices field between the FTC and the state governments. To the best of our knowledge, its desirability has not even been canvassed.

V - CONCLUSIONS

Professor Trebilcock's team was instructed to submit proposals for a model trade practices act. Our terms of reference were quite different and we were requested to direct our attention not towards the abstractly ideal but the constitutionally permissible and the politically acceptable. In this unsettled (and unsettling) environment it is not surprising that we were not able to emerge with a single set of finite answers but were left rather with a series of inspired guesses, constitutionally, and a number of alternative approaches politically. Our conclusions are as follows:

1. With the possible exception of its application to broadcasting and a number of other activities subject to specific federal powers, the provincial trade practices legislation is likely to be upheld as a legitimate exercise of the provincial power under sections 92(13) and 92(16) of the BNA Act.

2. Whatever the ultimate form of the new federal trade practices legislation, there is likely to be substantial overlap between it and the subsisting provincial legislation. If the Supreme Court of Canada continues to favour the exercise of concurrent powers, and perhaps even to expand the concept, the provincial legislation is likely to withstand the challenge of the paramountcy doctrine.

3. We are not disturbed by this possibility. The phenomenon has long been familiar to the Americans in the trade practices area and other areas of economic regulation and no calamitous consequences appear to have ensued. There is no reason to believe that the Canadian result will be significantly different but it does suggest the desirability of close co-operation between the two levels of government.

4. In keeping with the spirit of co-operative federalism we believe that the provinces should continue to be encouraged to adopt their own trade practices legislation and to administer it to the limits of their resources.

5. We do not favour the federal government abdicating its responsibility in this area of consumer protection. We believe that both the federal and provincial governments have their proper role to play.

6. There is good reason to believe that constitutionally the federal government could continue to exercise its well established criminal law powers for the purpose of enacting new trade practices legislation and these powers could probably also be invoked to justify such ancillary provisions as orders of prohibition, restitutionary orders, and orders involving the divestment of profits as part of the sentence of the court, without the act at large losing the benefits of the criminal law umbrella. It appears to us however to be very doubtful whether the full panoply of public and private law sanctions and remedies as envisaged in the Trebilcock report could survive the criminal law characterization. A court may feel that the centre of gravity has shifted or, at any rate, that the different components of the new act must be severed for the purposes of constitutional characterization.

7. Thus it is important to consider the proper place of the trade and commerce power in the prospective federal act. Subject to the outcome of the present litigation in the Vapor case*, we are not at all confident that the Supreme Court of Canada would treat the power as justifying the federal regulation of all types of trade practices

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* as to which see now the Introduction to this report.

-- intra- as well as inter-provincial. If the trade and commerce power is vulnerable on that score, we see little likelihood of the peace, order and good government clause being available as a fallback position.

8. We think it much more likely that the federal legislation would be upheld if it confined its scope to inter-provincial trade practices. We therefore recommend the double deployment of the criminal law and trade and commerce powers as the basis of the constitutional validity of the new act. In our opinion, most of the objections which might be raised within the Department to restricting the new act to inter-provincial practices can be answered satisfactorily. We do however see a difficulty arising out of the possibility that some provinces may have no trade practices legislation of their own thus leaving a lacuna in the network of protective legislation. To meet this difficulty we recommend the retention of the existing criminal law formula without territorial restrictions and a severable set of provisions restricted to inter-provincial practices which would be concerned with the exercise of administrative powers and public and private forms of civil redress.

9. An integrated form of administration of the federal and provincial acts would obviously be desirable but we see no early prospects for its realization. Nor do we see any significant scope for interdelegation of powers between the federal government and individual provinces but this is subject to the possible exception in the case of some of the smaller provinces who may lack the resources adequately to enforce their own legislation. Whether or not our appreciation of the political factors is correct, we certainly would not discourage interdelegation of powers if the administrative problems can be satisfactorily resolved.

10. Given our preceding conclusion, future emphasis would appear to be on a consultative rather than an integrated form of co-operative federalism. Within these broad parameters we strongly recommend the following types of programs: co-operation between the federal and provincial governments towards greater uniformity of legislation; continuous exchange of trade practices information between the two levels of government and the establishment of criteria for the territorial classification of practices and their allocation for investigative and enforcement purposes; the sharing of other facilities including the training of staff and office space; the establishment of a federal-provincial secretariat and, finally, the appointment of a co-ordinator of federal-provincial affairs.